United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

81

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10099

EASTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petition for Review of Orders of the Civil Aeronautics Board.

United States Court of Appeals
for the District of Columbia
Circuit
FILED APR 6 1949
Joseph W. Stewart
Clerk

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No.

EASTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION OF EASTERN AIR LINES, INC., FOR JUDICIAL REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD.

To the Honorable the Chief Justice and the Associate Justices of the United States Court of Appeals for the District of Columbia:

EASTERN AIR LINES, INC. (hereinafter sometimes referred to as "Eastern") presents this petition for judicial review of orders entered by the Civil Aeronautics Board (hereinafter sometimes referred to as "the Board"), and in support of said petition respectfully represents and alleges the following:

I.

THE NATURE OF THE PROCEEDING

1. This petiton seeks review of certain orders of the Board relative to a consolidated proceeding (known as the

"*Service in New England States* case, Docket 2196 *et al.*"—hereinafter referred to as "the proceeding"), in which, among other things, several applicants are seeking certificates of public convenience and necessity authorizing the scheduled air transportation of persons, property and mail to, from and between certain points in the New England area, and points adjacent thereto in New York, New Jersey, Canada and elsewhere. The Board has consolidated for hearing, argument and decision various applications involving additional service between Boston, Massachusetts on the one hand, and New York, New York and Newark, New Jersey on the other hand, via intermediate points, but has denied the motions of Eastern and of the Rhode Island Port and Industrial Development Commission, representing the State of Rhode Island, that the application of Eastern under Docket 3501 for additional route authority to engage in scheduled air transportation of persons, property and mail between the same points be consolidated for hearing and decision along with such other similar applications.

II.

JURISDICTION

2. This petition is filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938 (49 U.S.C. Section 646) and Section 10 of the Administrative Procedure Act of 1946 (5 U.S.C. Section 1009). As will hereinafter appear, Eastern has a "substantial interest" in the orders of the Board complained of herein, within the meaning of Section 1006 of the Civil Aeronautics Act, and Eastern also is a "person suffering legal wrong" and a person "adversely affected or aggrieved" by reason of the Board's orders within the meaning of Section 10 of the Administrative Procedure Act.

III.

THE RELIEF PRAYED

3. Eastern prays that the following orders of the Board be reviewed and set aside by this Court:

(a) Order Serial No. E-2201 dated November 17, 1948, which, among other things, denied Eastern's motion for consolidation in the proceeding of Eastern's application under Docket 3501; and

(b) Order Serial No. E-2308 dated December 21, 1948, denying motion of the Rhode Island Port and Industrial Development Commission, representing the State of Rhode Island, for consolidation in the proceeding of Eastern's application under Docket 3501.

Eastern requests that a copy of this petition be transmitted to the Board, and that the Board be required to certify and file in this Court a transcript of the record upon which the aforesaid orders were entered, in accordance with Section 1006 of the Civil Aeronautics Act; that upon the review requested herein the said orders of the Board be set aside in so far as they refuse consolidation in the proceeding of Eastern's application under Docket 3501; that the case be remanded to the Board for further proceedings consistent with this Court's opinion; and that this Court grant to Eastern such other and further relief as the Court may deem proper.

IV.

STATEMENT OF FACTS AND THE POINTS UPON WHICH PETITIONER INTENDS TO RELY

A. Statement of Facts.

4. Eastern is a Delaware corporation. For the past twenty years Eastern and its predecessor companies have been engaged in the business of transporting passengers, property and mail by aircraft as a common carrier.

5. Scheduled interstate air transportation of persons, property and mail can be conducted within the United States only pursuant to certificates of public convenience and necessity issued by the Board under Section 401 of the Civil Aeronautics Act of 1938 (49 U.S.C. Section 481).

6. Among the certificates of public convenience and necessity held by Eastern are those for Route 5 (Boston to Texas points via Providence, Rhode Island, Hartford, Connecticut, New Haven, Connecticut, New York, New York, Newark, New Jersey and numerous other intermediate points) and Route 6 (Boston to Miami, Florida via Providence, Hartford, New Haven, New York, Newark and numerous other intermediate points).

Such certificates are subject to a restriction which prohibits Eastern from providing local service suited to the convenience of Boston, Providence, Hartford, New Haven, New York and Newark in relation to each other. The restriction is as follows:

> "the holder shall serve Boston only on flights originating or terminating south of Richmond or west of Charleston [W. Va.]; . . . the holder shall serve Providence, Hartford and New Haven only on flights originating at Boston and terminating south of Richmond or west of Charleston or on flights originating south of Richmond or west of Charleston and terminating at Boston."

7. On October 21, 1947, a Prehearing Conference was held before an Examiner of the Board in a proceeding then tentatively designated as "*Additional Service in New England,* Docket 1279 *et al.*" The Examiner's Report of Prehearing Conference, issued November 6, 1947, described the nature and intended scope of the proceeding as follows (November 6, 1947, Report p. 2):

> "The examiner announced that this proceeding would be limited to applications seeking authority to provide new or additional service in the New England States. It was also announced that applications re-

questing routes outside of this general area would not be recommended for consolidation in this proceeding unless the service proposed was incidental to service in New England and in a region reasonably adjacent to cities in the New England States.

"In view of the difficulties that inevitably arise in attempting to consider applications for both trunk-line service and local or feeder-line service in the same proceeding, the examiner stated at the outset that he would very likely recommend to the Board that this proceeding be limited to proposals for local or feeder-line services unless the trunk-line applicants could show that they would be adversely affected by such procedure."

8. Applications which were considered for consolidation at that Prehearing Conference included the following which involved service between Boston and New York via various intermediate points:

(a) An application of Northeast Airlines, Inc., under Docket 3182 to add Bridgeport, New Haven and Hartford as intermediate points on its New York-Boston-Caribou (Maine) Route 27 (November 6, 1947, Report p. 3);

(b) An application of E. W. Wiggins Airways, Inc., under Docket 2572 to add certain route segments between Boston and New York on its Route 79, and to amend the restriction which now prohibits Wiggins from beginning or terminating trips short of terminal points and from omitting certificated stops (November 6, 1947, Report p. 5);

(c) An application of New England Central Airways System, Inc., under Docket 2196, which was amended under date of November 14, 1947, to seek a route from Boston to New York (Westchester) and Newark (Teterboro) via certain intermediate points (November 6, 1947, Report p. 7);

(d) An application of Putnam Air Lines, under Docket 2757 for routes between New York City and various points in Connecticut, Rhode Island and Massachusetts (November 6, 1947, Report p. 7).

9. By Order Serial No. E-1049, issued December 10, 1947, the Board dismissed various applications, including Docket 1279 which previously had been the lead docket number in the proceeding, and by Order Serial No. E-1048, issued the same day, the Board consolidated various applications, including those listed in Paragraph 8 above, into a proceeding known as "*Additional Service in New England States* case, Docket 2196, *et al.*" By Order Serial No. E-1149, issued January 26, 1948, the Board eliminated certain applications from the consolidated proceeding at the request of the applicants, but left in the proceeding all of the applications listed in Paragraph 8 above.

10. By Order Serial No. E-1890, issued August 24, 1948, the Board consolidated the consolidated proceeding under Docket 2196 with an application of Northeast Airlines, Inc., and E. W. Wiggins Airways, Inc., under Docket 3337 for transfer of certain route authorizations (including a route between Boston and New York and Newark via various intermediate points) from Northeast to Wiggins, and designated the new consolidated proceeding as "*Service in New England States* case, Docket 2196 *et al.*"

11. On September 17, 1948, a further Prehearing Conference was held before an Examiner of the Board with respect to the proceeding under Docket 2196. At that conference, it was determined that the geographical scope of the proceeding should "be confined in its western boundary to cities in eastern New York State, including such cities as Albany, Schenectady, New York, White Plains and other cities in the geographical vicinity of said points" (Report of Prehearing Conference, issued September 30, 1948, p. 5). With respect to the agreement between Northeast Airlines, Inc., and E. W. Wiggins Airways, Inc., for transfer of route authorizations, the Prehearing Conference Report of September 30, 1948 (pp. 2-3) stated as follows:

> "It is contemplated that if the Board approves this agreement, Northeast will transfer to Wiggins and

Wiggins will acquire from Northeast many of Northeast's present operating rights with respect to local and feeder line services in New England and that subsequent to such transfer, Northeast will perform an exclusively regional trunk line operation in New England and Wiggins will perform an area-wide regional local and feeder line service. In addition to the transfer of certain of Northeast's operating rights under its present certificate, the route pattern agreement contemplates the creation of a number of new services between various points in the New England area and the abandonment of certain services between pairs of points now included in Northeast's present certificate."

12. With respect to a proposed application of Eastern, which eventuated in the application under Docket 3501, the September 30, 1948, Prehearing Conference Report states as follows (pp. 5-6):

"Counsel for Eastern requested that Eastern be allowed several days within which to file an application for removal of the restrictions upon its operation between New York and Boston and stated that Eastern will request such application to be considered and heard in the present proceeding. Counsel for Northeast and American expressed opposition to Eastern's proposal and pointed out that a similar proposal by Eastern had but recently been denied by the Board. The examiner presiding stated that in view of Northeast's statement that it was withdrawing paragraph 4 (a) of its application under Docket No. 3182, he was unable to see any relation between the proceeding as it now stands and Eastern's proposal, and that in his opinion the Eastern proposal would enlarge the scope of the proceeding. Counsel for Eastern stated that the application would be filed with a motion that it be consolidated with the present proceeding and the examiner then indicated that in view of the circumstances as set forth, he would be unable to recommend that it be included in this proceeding. As hereinbefore indicated, Counsel for Northeast stated that if Eastern's application for the removal of the restriction in question is heard in this

proceeding, Northeast would not withdraw paragraph 4 (a) of its application under Docket No. 3182."

13. The Prehearing Conference Report (p. 9), granted the following permission for filing new applications:

> "Persons wishing to file new applications or motions to consolidate other applications already on file with the present consolidated proceeding are directed to file appropriate documents not later than October 4, 1948."

14. Under date of September 27, 1948, Eastern filed with the Board its application under Docket 3501, requesting in Paragraphs 8 and 9 that the Board "remove all existing restrictions" on Eastern's Route 5 and Route 6 "operations and service to and from Boston, Mass., Providence, R. I., Hartford, Conn., and New Haven, Conn."; and stating further in Paragraph 10 that Eastern "seeks said new and additional authorizations either as amendments to its existing Routes 5 and 6, or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston, as to the Board may appear desirable in the public interest."

15. Under date of September 27, 1948, Eastern filed with the Board, in the proceeding under Docket 2196, its "Motion for Consolidation for Hearing and Decision," in which it requested "that the Board consolidate for hearing and decision in this proceeding Eastern's application filed this day proposing improved local service for New England points" (Docket 3501). Said motion pointed out (p. 2) that Eastern's application under Docket 3501 was in the alternative—either (1) for removal of restrictions on Route 5 and Route 6 operations to and from Boston, Providence, Hartford and New Haven or (2) for "new local service routes" between New York and those cities. The motion further pointed out (p. 2) that other applications which had already been consolidated in the proceeding involved similar local service, and (Motion, pp. 3-5) that principles of fairness, the Board's established practice and the procedure required by

the Civil Aeronautics Act and by judicial decisions required the requested consolidation.

16. Under date of November 12, 1948, the State of Rhode Island, by and through the Rhode Island Port and Industrial Development Commission, filed a "Motion for Consolidation for Hearing and Decision" in which it requested that the Board "consider Eastern's application in this consolidated proceeding." That motion pointed out (pp. 1-2) that Eastern's proposal under Docket 3501 was to provide schedules "which would be set for the particular convenience" of "Providence and other New England cities," and that Eastern's authorization was necessary in order to give Providence "effective competitive service to and from New York, Boston or other points in the New England area." The Rhode Island motion also pointed out (p. 2) that "Other applications for additional and improved service between Providence and New York and between Providence and other New England points are under consideration in this proceeding," and that "It would be prejudicial to the State of Rhode Island, as well as to Eastern, if all applications proposing additional local service in the New England area were not heard together." That motion emphasized (p. 3) that, in so far as Eastern's application involves removal of a restriction from existing certificates, it is similar to the application of E. W. Wiggins Airways, Inc., under Docket 2572, which proposes removal of restrictions contained in Wiggins' certificate; and (Motion, p. 4) that actually Eastern's application proposes "a new route between New York/Newark and Boston."

17. By Order Serial No. E-2201, dated November 17, 1948, the Board denied Eastern's motion to consolidate its application under Docket 3501 with the proceeding under Docket 2196, finding (Order, p. 2) that "consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the scope of the above-entitled proceeding"; and ordering (Order, p. 3) "That the afore-

said motion of Eastern to consolidate its application in Docket No. 3501 in the above-entitled proceeding be and it is hereby denied."

18. By Order Serial No. E-2308, the Board denied the motion for consolidation filed on behalf of the State of Rhode Island, finding (Order, p. 1) "That consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the scope of the above-entitled proceeding"; and ordering (Order, p. 2) "That the aforementioned motion of the Rhode Island Port and Industrial Development Commission be and hereby is denied."

19. Eastern plainly has a "substantial interest" in the Orders of the Board denying consolidation of Eastern's application under Docket 3501 into this proceeding for hearing and decision, for the effect of the Board's Orders would be to put the Board in a position to grant applications for new route authorizations which are similar to Eastern's requests under Docket 3501 without giving consideration to Eastern's application, and Eastern believes that the granting of any such other applications would seriously prejudice Eastern's application and in all probability would foreclose the authorization which Eastern seeks. Therefore, Eastern has the "substantial interest" required by Section 1006 (a) of the Act to seek judicial review of said Orders.

B. Points Upon Which Petitioner Intends to Rely.

20. The Board erred in denying the motions for consolidation for the reason that the Board thereby ignored its duty under Section 401 (d) of the Act to grant certificates only after finding that "the public convenience and necessity" require the transportation so authorized. The "public convenience and necessity" are defined in Section 2 of the Act as requiring:

> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce

of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

Plainly the Board cannot determine what air transportation system, as applied to the New England area, is "properly adapted" to the public needs, what is "sound," what is "adequate," what is "*necessary* to assure the *sound* development" of a national air transportation system, or what is "best" to promote commerce unless it compares Eastern's proposal with other available proposals to provide the same type of service in the same area, and leaves itself in a position to grant the one best suited to the national objectives as stated in Section 2 of the Act.

21. The Board erred in denying the motions for consolidation in that it failed to follow a precept which it has repeatedly announced to the effect that "the comparative public interest" must prevail in the selection of the carrier to operate a particular service. *North Atlantic Route* case, 6 C.A.B. 319, 339 (1946); *The Florida* case, 6 C.A.B. 765, 772 (1946); *Additional Service to Latin America,* 6 C.A.B. 857, 904 (1946); *West Coast* case, 6 C.A.B. 916, 996, 997 (1946); *American Overseas Airlines, Inc., South Atlantic Routes,* 7 C.A.B. 285, 307 (1946). The Board cannot properly determine the essential elements of "comparative public interest" in this proceeding if it declines to consolidate Eastern's application so that it will be able to compare Eastern's proposal with the similar proposals of other carriers.

22. The Board erred in denying the motions for consolidation in that it departed from the principles of consolidation which it has announced in previous decisions and on which Eastern and others have been and are entitled to rely. In *Investigation of Local, Feeder and Pick-Up Air Service,* 6 C.A.B. 1, 1-2 (1944), the Board announced the following policy with respect to consolidation of applications for hearing and decision:

> "One of the more controversial recommendations made by the examiners is the recommendation that extensions by presently operating air carriers should be limited to cities having metropolitan populations of 25,000 or greater, except upon a showing that such extensions will not adversely affect the operation of proposed feeder services in the same general area. This recommendation was presented as a solution to the problem which existed at the time of the investigation resulting from the consideration by the Board of appli-

cations involving the addition of new points to existing routes, without at the same time considering so-called local or feeder applications in the same area. Inasmuch as the Board has since adopted the general practice of hearing in a consolidated proceeding all applications proposing service in the same general area, it does not appear necessary to consider further the population limitation proposed by the examiners. A consolidated proceeding affords full opportunity to consider the character of services proposed by the various applicants and the relationship of the type of each service to the air transportation needs of the individual cities or towns. If a need for long-haul or through service is apparent, this need can be provided for by designating the city as a stop on one or more existing routes. At the same time the need for service of a local character can be weighed in conjunction with local service proposals."

As Eastern's application is one of the "applications proposing service in the same general area"—the New England area—the Board's policy so announced requires that it follow its "general practice" and consolidate Eastern's application in this proceeding. Even if Eastern's application were deemed to be in part for "long-haul or through service," despite Eastern's request that its application be considered also as one for "new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston," the Board's established practice requires that it be considered in this proceeding along with applications for purely local service.

23. The Board erred in denying the motions for consolidation in that the Board departed from its published practice and procedure, contrary to Section 3 (a) of the Administrative Procedure Act of 1946, which requires every

agency to publish descriptions of its organization, delegations of authority, "statements of the general course and method by which its functions are channelled and determined, including the nature and requirements of all formal or informal procedures available," and "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public." Pursuant to that requirement, the Board has adopted and published its Organizational Regulations (12 F.R. 7995), Section 302.7 (b) (2) of which provides in part as follows:

> "In proceedings upon applications by air carriers for new routes, it is customary to assign all pending applications for a similar service in the same general area for conference at one time."

While this regulation, when closely analyzed, appears to relate only to the prehearing conference stage of a proceeding, the fair intent of the regulations (particularly when viewed in the light of the announcements of the Board cited in Paragraphs 21 and 22 above) is that "all pending applications for a similar service in the same general area" will be assigned for hearing at one time unless, of course, some of the applicants consent to have their applications deferred for another proceeding. Having made known its policy and procedure in this respect, the Board has no power under Section 3 (a) of the Administrative Procedure Act to require Eastern "to resort to organization or procedure not so published."

24. The Board erred in denying the motions for consolidation in that the Board thereby would effectively deprive Eastern of a fair hearing on its application under Docket 3501, contrary to the Civil Aeronautics Act, the Administrative Procedure Act and the Constitution of the United States. Section 401 (c) of the Civil Aeronautics Act requires that Eastern be given a "public hearing" on its ap-

plication. Sections 5, 7 and 8 of the Administrative Procedure Act make certain requirements with respect to such hearings. The Fifth Amendment to the Constitution of the United States requires that Eastern be given substantive and procedural "due process." *Morgan* v. *United States,* 304 U. S. 1 (1938). The action of the Board in excluding Eastern's application from this proceeding while including the applications of others for similar service in the same area would, for all practical purposes, deny Eastern a hearing on its application. *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327 (1945).

The Board has recognized in other cases (*e.g. North Central* case, 7 C.A.B. 639, 646 (1946), that decision on one application might well result in restricting the Board's freedom of action on other similar applications unless all such applications are decided together. This proceeding presents a situation where concurrent hearing and decision on all similar applications is particularly necessary in order to give Eastern a fair hearing and to leave the Board free to authorize the proposal which is most in the public interest. Not only is there the usual conflict between opposing applicants for the same authority, but here the authorization of another "local" carrier in the New England area would make practically impossible the granting of Eastern's requested authorizations in a later proceeding. The Board imposed the restrictions on Eastern's operations to and from New England in order to protect the carriers authorized to provide local service in the New York-Boston area. *Additional Service to Boston,* 4 C.A.B. 686, 695 (1944); *New England Case,* 7 C.A.B. 27, 36, 439, 441 (1946). Obviously, if other carriers should be authorized in that area, as proposed in this proceeding, the original reasons for the restrictions would be multiplied, and Eastern would be unable to obtain the authorizations sought in its application. The result would be that Eastern would be denied a hearing

on its application by reason of the Board's action in this proceeding.

25. The Board erred in denying the motions for consolidation in that the Board thereby ignored its duty with respect to Eastern's application, which, under Section 401 (c) of the Civil Aeronautics Act is to "dispose of such application as speedily as possible." In view of the fact that Eastern's application proposes the same type of service which is under consideration in this proceeding, it is plain that the only manner in which the Board can dispose of Eastern's application "as speedily as possible" is to decide it in this proceeding.

26. The Board erred in denying motions for consolidation in that the Board failed to make the findings required by law. As noted above in Paragraphs 17 and 18, the only finding made by the Board with respect to either of the motions to consolidate was that the consolidation of Eastern's application "would unduly expand the issues and broaden the scope" of the proceeding. It seems clear that such finding is not a sufficient compliance with the requirements of law. Section 1005 (f) requires that every order of the Board "shall set forth the findings of fact upon which it is based." The Board's finding in the orders here involved is not an adequate "finding of fact," but is merely a statement of a conclusion. *Saginaw Broadcasting Company* v. *Federal Communications Commission,* 68 App. D. C. 282, 96 F. (2d) 554 (1938). Section 6 (d) of the Administrative Procedure Act provides as follows:

> "(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

It seems clear that the Board's finding in connection with these Orders is not "self-explanatory," and does not comply with the requirements of the Administrative Procedure Act. It should be observed that the motions for consolidation set out very specific reasons why the application of Eastern should be consolidated in this proceeding. The Board's Orders brush off all such reasons with a mere statement of conclusion which throws no light whatever on the Board's reasons for refusing consolidation. Under the Civil Aeronautics Act and the Administrative Procedure Act, Eastern and the State of Rhode Island are entitled to a statement of the Board's reasons for rejecting the sound arguments presented in the motions.

27. The Board erred in denying the motions for consolidation in that the Board incorrectly concluded that consolidation of Eastern's application under Docket 3501 "would unduly expand the issues and broaden the scope" of the proceeding. As pointed out in the motions, and as noted briefly in Paragraphs 15 and 16 above, Eastern's application is precisely within the scope of the proceeding, both from the standpoint of geography and from the standpoint of the type of service proposed, as well as in all other respects. Its consolidation into the proceeding will not unduly expand the issues or broaden the scope, since the same issues and the same area must be considered by the Board irrespective of such consolidation.

WHEREFORE, your Petitioner prays that the aforesaid orders of the Civil Aeronautics Board be reviewed by this Court, that a copy of this petition be transmitted to the Civil Aeronautics Board; that the transcript of the record upon which said orders were rendered be thereupon certified and filed by the Board in this Court in accordance with Section 1006 of the Civil Aeronautics Act (49 U.S.C. Sec. 646); and that upon such review, the Court set aside the

aforesaid orders to the extent that they deny the motions of Eastern and the State of Rhode Island for consolidation for hearing and decision in this proceeding of Eastern's application under Docket 3501. Your Petitioner further prays for such other, further and different relief as to this Court may seem just and proper in the premises.
Dated January 13, 1949.

EASTERN AIR LINES, INC.

E. SMYTHE GAMBRELL,

W. GLEN HARLAN,

HAROLD L. RUSSELL,

825 Citizens & Southern Bank Bldg.,

Atlanta 3, Georgia

LLEWELLYN C. THOMAS,

Hibbs Bldg.,

Washington, D. C.,

Attorneys for
Eastern Air Lines, Inc.

GAMBRELL, HARLAN & BARWICK,

825 Citizens & Southern Bank Bldg.,

Atlanta 3, Georgia,

Of Counsel.

Application of New England Central Airways System, Inc., Docket No. 2196, Filed January 17, 1946.

2 1. NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC., a Massachusetts Corporation, recently formed, wishes to acquire a certificate to operate a scheduled airline service between Boston, Massachusetts and Albany, New York, and Boston, Massachusetts, and Bar Harbor, Maine.

2. The routes which NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. wishes to have approved by the Civil Aeronautics Board are as follows:

a. Boston, Massachusetts to Hartford, Connecticut, to Schenectady, New York, to Albany, New York, to Hartford, Connecticut, to Boston, Massachusetts. Landings will be made at the following cities: Boston, Massachusetts; Hartford, Connecticut; Schenectady, New York; Albany, New York.

Routing will be as follows:

Boston, Massachusetts to Hartford, Connecticut via airways, amber 7 (seven); Hartford, Connecticut to Schenectady, New York via airways red 13 (thirteen): to Westfield, Massachusetts and thence joining airways green 2 (two) at Westfield, Massachusetts to Schenectady, New York; Schenectady, New York to Albany, New York via airways green 2 (two); Albany, New York to Hartford, Connecticut via airways green 2 (two); to Westfield, Massachusetts and thence
3 joining airways red 13 (thirteen) at Westfield, Massachusetts to Hartford, Connecticut; Hartford, Connecticut; Hartford, Connecticut, to Boston, Massachusetts via airways amber 7 (seven).

b. Boston, Massachusetts to Concord, New Hampshire to Sanford, Maine to Portland, Maine to Lewiston, Maine to Rockland, Maine to Bar Harbor, Maine to

Rockland, Maine to Lewiston, Maine to Portland, Maine to Sanford, Maine to Concord, New Hampshire, to Boston, Massachusetts.
Landings will be made at the following cities: Boston, Massachusetts; Concord, New Hampshire; Sanford, Maine; Portland, Maine; Lewiston, Maine; Rockland, Maine; Bar Harbor, Maine.

Routing will be as follows:

Boston, Massachusetts to Concord, New Hampshire via airways blue 4 (four); Concord, New Hampshire to Sanford, Maine via airways red 8 (eight); Sanford, Maine to Portland, Maine via airways red 8 (eight); Portland, Maine to Lewiston, Maine direct; Lewiston, Maine to Rockland, Maine direct; Rockland, Maine to Bar Harbor, Maine direct over Penobscot Bay. Bar Harbor, Maine to Rockland, Maine direct over Penobscot Bay; Rockland, Maine to Lewiston, Maine direct; Lewiston, Maine to Portland, Maine direct; Portland, Maine to Sanford, Maine via airways red 8 (eight); Sanford, Maine to Concord, New Hampshire via airways red 8 (eight); Concord, New Hampshire to
4 Boston, Massachusetts, via airways blue 4 (four).

c. At some later date and if business warrants it, NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. will request permission to land at Westfield, Massachusetts on its Boston, Massachusetts to Albany, New York flight. Routing will be the same as outlined above.

d. The above routes are planned to go into operation on or before the first of April, 1946, as non-scheduled flights for 120 days, after which NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. wishes to receive its certificate to operate on schedule.

e. If the Civil Aeronautics Board issues to NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. a certificate to operate on a scheduled basis before the 120 days of proposed non-scheduled flights expire, NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. will operate immediately on a scheduled basis.

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11. NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. will use on both routes Douglas DC-3's, which will be purchased from the United States Government, and converted by NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. The seating capacity will be twenty-three passengers, two pilots and one steward.

12. NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. proposes two round trips daily except Sunday from Boston, Massachusetts to Hartford, Connecticut to Schenectady, New York to Albany, New York. One round trip will be operated daily except Wednesday and Thursday in the summer months from Boston, Massachusetts to Concord, New Hampshire to Sanford, Maine to Portland, Maine to Lewiston, Maine to Rockland, Maine to Bar Harbor, Maine. In the winter months, NEW ENGLAND AIRWAYS SYSTEM, INC. wishes to run one round trip daily except Wednesday and Thursday from Boston, Massachusetts to Concord, New Hampshire to Sanford, Maine to Portland, Maine to Sanford, Maine to Concord, New Hampshire to Boston, Massachusetts.

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18. NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. will proceed to receive mail and cargo contracts from United States Mail for all its flights.

* * * * * * * * * * *

20. NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC. does not wish to be known as a Feeder-Line but as a regular certified Airline.

* * * * * * * * * * *

Amendment of Application of New England Central Airways System, Inc., Docket No. 2196, Filed November 18, 1947.

New England Central Airways System, Inc. by Raymond P. Baldwin, its attorney, amends its application for certificate of public convenience and necessity, Docket No. 2196, by adding thereto the following new paragraph, immediately after paragraph numbered 21(5) thereof:

"22. Applicant, though desirous of approval by the Board of the routes above set forth and of the issuance to applicant of a certificate of public convenience and necessity therefor, is willing to accept a certificate for any part or parts of such routes or of such other routes serving New England as the Board may determine that public convenience and necessity require, with preference, however, in the order named, for the following alternative routes:

1a. Boston, Massachusetts—Provincetown, Massachusetts—Hyannis, Massachusetts—Martha's Vineyard, Massachusetts—New Bedford, Massachusetts.

1b. Extension of above route preferred to Bridgeport, Connecticut, Westchester, New York and Teterboro, New Jersey.

2. Boston, Massachusetts—Worcester, Massachusetts—Westfield, Massachusettes—Pittsfield, Massachusetts—Albany, New York—Schenectady, New York.

3. Bridgeport, Connecticut—Hartford, Connecticut—Westfield, Massachusetts—Albany, New York Schenectady, New York.

4. Boston, Massachusetts—Sanford, Maine—Portland, Maine—Brunswick, Maine—Rockland, Maine

—Belfast, Maine—Bar Harbor, Maine—Princeton, Maine—Eastport, Maine.

5. Boston, Massachusetts—Fitchburg, Massachusetts—Keene, New Hampshire—Claremont, New Hampshire — Lebanon, New Hampshire — Barre-Montpelier, Vermont—Newport, Vermont.

6. Burlington, Vermont — Rutland, Vermont — Keene, New Hampshire—Orange, Massachusetts—Worcester, Massachusetts—Providence, R. I.—New Bedford, Massachusetts.

7. Boston, Massachusetts—Manchester, New Hampshire—Concord, New Hampshire—Laconia, New Hampshire—Berlin, New Hampshire.

8. Portland, Maine—Concord, New Hampshire—Claremont, New Hampshire—Rutland, Vermont—Burlington, Vermont."

* * * * * * * * * * *

Application of Putnam Airlines, Docket No. 2757, Filed January 10, 1947.

24 Putnam Airlines files this application for a certificate of public convenience and necessity in accordance with Section 401 of the Civil Aeronautics Act to transport persons, property and mail by air in scheduled transportation.

(1) The full name and address of applicant is Putnam Airlines, 18 Truesdell Street, Putnam, Connecticut. Putnam Airlines is a trade name used by Martin Aldeman.

(2) Putnam Airlines is a citizen of the United States. Martin Aldeman is a citizen of the United States.

(3) The identification of the routes for which a certificate is desired is as follows:

Route No. 1—Between Putnam, Conn., Milford, Mass., Boston, Mass., Framingham, Mass., Worcester, Mass., Willimantic, Conn., Middletown, Conn., Waterbury,

Conn., Danbury, Conn., New York City, Bridgeport, Conn., New Haven, Conn., Norwich, Conn.

Route No. 2—Between Putnam, Conn., Norwich, Conn., New Haven, Conn., Bridgeport, Conn., New York City, Danbury, Conn., Waterbury, Conn., Middletown, Conn., Willimantic, Conn., Worcester, Mass., Framingham, Mass., Boston, Mass., Milford, Mass.

Route No. 3—Between Putnam, Conn., Providence, R. I., Worcester, Mass., Southbridge, Mass., Springfield, Mass., Windsor Locks, Conn., Hartford, Conn., New London, Conn., Providence, R. I.

Route No. 4—Between Putnam, Conn., Providence, R. I., New London, Conn., Hartford, Conn., Windsor Locks, Conn., Springfield, Mass., Southbridge, Mass., Worcester, Mass., Providence, R. I.

25 (4) The applicant is selecting Putnam, Connecticut for its operations base because of its central location to give service to all terminal stops.

(5) The applicant proposes to use such equivalent equipment as may be suitable for the operation, as the carrier equipment.

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Amendment No. 2 to Application of Putnam Airlines, Docket No. 2757, Filed February 3, 1947.

28 Amendment to our Application of Putnam Airlines Docket No. 2757 for a Certificate of Public Convenience and Necessity, filed under Section 401 of the Civil Aeronautics Act of 1938.

(1) Putnam Airlines desires the additional following Routes:

Route No. 5—Between Putnam, Conn. and Boston, Mass.

Route No. 6—Between Putnam, Conn. and New York, N. Y.

Route No. 7—Between Putnam, Conn., Springfield, Mass. and Hartford, Conn.

Route No. 8—Between Putnam, Conn., Worcester, Mass., and Milford, Mass.

Route No. 9—Between Putnam, Conn., New Haven, Conn., and New London, Conn.

Route No. 10—Between Putnam, Conn., Hartford, Conn., and Springfield, Mass.

Route No. 11—Between Putnam, Conn., Milford, Mass., and Worcester, Mass.

Route No. 12—Between Putnam, Conn., New London, Conn., and New Haven, Conn.

* * * * * * * * * *

Application of Royal Air Lines, Docket No. 2925, Filed May 5, 1947.

30 2. Authority is requested to engage in scheduled air transportation of Mail and Property between the terminal points Eastport, Maine and Boston, Mass. via the intermediate points Bar Harbor, Belfast, Rockland, Brunswick-Bath, & Biddleford-Saco, Maine. See attached schedule Exhibit A. A Map showing the proposed route, all terminals and intermediate points and mileage involved is also attached as Exhibit B.

3. Applicant proposes to use Bellanca Cruisair Seniors, or larger aircraft whenever necessary. In other words, the applicant will utilize the most suitable aircraft at all times in order to give maximum service. Applicant owns at present one Bellanca Cruisair Senior, Mfg. 1947, one Cessna T-50, Mfg. 1943, and one Piper Super Cruiser, Mfg. 1946.

* * * * * * * * * *

Amendment of Application of Royal Air Lines, Docket No. 2925, Filed October 28, 1947.

35 Amend line three, paragraph one, page one to read as follows:

"applicant" applies for a permanent, but applicant *will* accept a temporary certificate of public convenience.

Amend paragraph three in its entirety to read as follows:

2. Authority is requested to engage in schedule air transportation of combined Mail, Property, and Passengers between the terminal points Eastport, Maine and Boston, Mass. via the intermediate points Bar Harbor, Belfast, Rockland, Brunswick-Bath, and Biddeford-Saco, Maine. Between the Terminal points Millinocket, Maine and Boston, Mass. via the intermediate points Dexter, Skowhegan, Rumford-Mexico, Fryeburg, Me.-N. Conway, N. H., Loconia, N. H. and Manchester-Nashua, N. H. Between the terminal points Burlington, Vt. and Boston, Mass. via the intermediate points St. Johnsbury, Vt., Berline, N. H., Auburn-Lewiston, Me., Portland and Biddeford-Saco, Me. See attached schedule Exhibit A1 supplementing Exhibit A Page 2 of the original application. See attached Exhibit B1, supplementing Exhibit B in its entirety, A Map showing the proposed routes, all terminals and intermediate points and mileage involved.

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Application of Northeast Airlines, Inc., Docket No. 3182, Filed October 30, 1947.

42 Applicant is an air carrier of persons, property and mail in scheduled interstate and foreign air transportation, and holds certificates of public convenience and necessity issued to it pursuant to the Act authorizing it to engage in such air transportation on the following routes:

ROUTE 27

(1) Between the co-terminal points New York, N. Y., and Newark, N. J., the intermediate points Stamford-Norwalk, Conn.; Waterbury, Conn.; Worcester, Mass.; Boston, Mass.; Lawrence, Mass.; Portsmouth, N. H.; Saco-Biddeford, Maine; Portland, Maine; Brunswick, Maine; Lewiston-Auburn, Maine; Rockland, Maine; Augusta, Maine; Waterville, Maine; Belfast, Maine; Bangor, Maine; Millinocket, Maine; Houlton, Maine; Presque Isle, Maine, and the terminal point Caribou, Maine. (Hereinafter called Segment (1)

(2) Between the co-terminal points New York, N. Y., and Newark, N. J., the intermediate points Islip and Riverhead, N. Y.; New London, Conn. and Providence, R. I., and (a) beyond Providence, R. I., the terminal point Boston, Mass., and (b) beyond Providence, R. I., the intermediate points Newport, R. I., New Bedford-Fall River, Oak Bluffs, Nantucket, Hyannis and Provincetown, Mass. and the terminal point Boston, Mass.

(3) Between the terminal point Boston, Mass., the intermediate points Manchester, N. H., Concord, N. H., White River Junction, Vt., Montpelier-Barre, Vt., and the intermediate point Burlington, Vt. (Hereinafter called Segment (3)

(4) Between the terminal point Portland, Maine, the intermediate points Lewiston-Auburn, Maine; North Conway, N. H. (during the period from June 1 to September 30 inclusive of each year), Berlin, N. H.; St. Johnsbury, Vt., Montpelier-Barre, Vt., and the terminal point Burlington, Vt.

(5) Between the co-terminal points New York, N. Y., and Newark, N. J., the intermediate points Bridgeport, Conn.; New Haven, Conn.; Hartford, Conn.; Spring-

field, Mass.; Northampton, Mass.; Greenfield, Mass.; Keene, N. H.; Claremont, N. H., and the terminal point White River Junction, Vt. (Hereinafter called Segment (5)

subject to restrictions as follows:

(1) that neither Brunswick, Rockland nor Belfast, Maine, may be served on flights serving Lewiston-Auburn, Augusta or Waterville, Maine; and

(2) that each flight over Segment (5) shall serve at least two intermediate points.

43 ROUTE 27 F

Between the intermediate point Burlington, Vt. and the terminal point Montreal, Canada, and between the intermediate point Bangor, Maine, and the terminal point Moncton, N. B.

4. Applicant hereby applies under Section 401 of the Act and such other sections thereof as may be applicable for amendment of its certificate of public convenience and necessity for Route 27, as amended, in the following respects:

(a) By adding Bridgeport, New Haven and Hartford, Connecticut, and Springfield, Massachusetts (all of which cities are now intermediate points on Segment (5) of said route) as additional intermediate points between the co-terminal points New York and Newark and the intermediate point Worcester, Massachusetts, on Segment (1) thereof, so that such cities will be intermediate points on both Segment (1) and Segment (5).

(b) By adding Manchester and Concord, New Hampshire (which are intermediate points on Segment (3) of said route) as alternate intermediate points between the intermediate points Worcester, Massachusetts and Portsmouth, New Hampshire, on Segment (1) thereof, so that Manchester and Concord will be both

alternate intermediate points on Segment (1) and intermediates on Segment (3).

(c) By extending Segment (5) to the new terminal point, Burlington, Vt., via, as intermediate points, the present terminal point, White River Junction, and Montpelier, Vermont, and by removing the restriction which requires that all flights over Segment (5) serve at least two intermediate points.

5. Applicant is prepared to serve and hereby applies to serve such other terminal points and such other intermediate points in the New England area as the Board may find to be points at or through which air transportation service is required by the public convenience and necessity.

6. Attached hereto and marked "Exhibit A" is a map drawn approximately to scale, showing the terminal and intermediate points on Segments (1) and (5) of Applicant's Route 27, giving effect to the amendments proposed in this application.

7. Applicant proposes to use Douglas DC-3 and DC-4 aircraft either now in its possession or hereafter to be acquired by it, and/or such other and more suitable
44 aircraft as may hereafter become available to it in providing the air transportation for which authorization is applied for herein.

8. Applicant is fit, willing and able to perform properly the air transportation covered by this application and to conform to the provisions of the Act and the rules, regulations and requirements of the Board thereunder. The amendments to its certificate which applicant proposes are required by the public convenience and necessity, and the transportation service proposed to be rendered pursuant to such amendments is required by the public convenience and necessity.

WHEREFORE, Applicant prays that the Board enter an appropriate order amending Applicant's certificate of public convenience and necessity for Route 27, as amended, in accordance with paragraphs 4 and 5 hereof, and grant-

ing such other and further relief as the Board may deem just and proper.

* * * * * * * * * *

Petition of Colonial Airlines, Inc., for Leave to Intervene in Docket No. 3182, Filed November 21, 1947.

48 Your petitioner, Colonial Airlines, Inc., respectfully submits that it has a property and financial interest in the above entitled application and requests leave to intervene therein and in support thereof avers:

1. That Colonial Airlines, Inc., is a duly certificated air carrier of persons, property and mail over Route No. 72-72F between New York, N. Y., and Montreal-Ottawa,

49 Canada, Route No. 71-71F between Washington, D. C., and Montreal-Ottawa, Canada, and Route No. FAM 33 between New York and Washington, D. C., and Hamilton, Bermuda.

2. That Northeast Airlines, Inc., has applied in Docket No. 3182 for an extension of Segment No. 5 of its route No. 27 to Burlington, Vt., via the present terminal point White River Junction and Montpelier, Vt., an extension which would duplicate Colonial's New York-Burlington service and endanger the property and financial rights to which Colonial is entitled.

3. That the granting of the request of Northeast Airlines, Inc., to operate between Burlington and New York will work a financial hardship upon your petitioner.

4. Colonial Airlines, Inc., has a property and financial interest in the said proceeding which can not be adequately represented by existing parties.

5. The granting of this application will not unduly broaden the issue or delay the proceeding.

WHEREFORE, your petitioner, Colonial Airlines, Inc., prays leave to intervene in and become a party to any proceedings involving the above entitled application, with full right to participate in all or any part of the proceeding.

* * * * * * * * * *

53 6. In an effort to achieve their mutual objective of improved New England air service, Northeast and Wiggins have developed a proposed New England air transportation service pattern which they mutually believe to be the most desirable for New England, best suited to meet the air transportation needs of New England, and therefore required by the public convenience and necessity. The air service pattern so formulated by Northeast and Wiggins is premised upon the belief that there exists a primary and urgent need in New England for (a) a single, strong regional trunkline system, serving the most important population and air traffic centers in the area, and
54 affording New England a trunkline air service specially adapted to New England's needs, and (b) a noncompetitive, complementary, and independent, strong local and feederline system, with operational flexibility permitting a logical service pattern and efficient operations, could provide the local point-to-point service, and in addition would connect with the regional trunkline service at each of the trunkline service points, and thereby provide frequent and convenient connecting air service between the smaller cities in the area and such trunkline points. Such an air service pattern for New England would permit the regional trunkline carrier to concentrate exclusively upon rendering the best possible regional trunkline service, and would permit the local and feederline operator to develop, to the maximum of its ability, not merely the wholly local point-to-point traffic, but also the connecting traffic which it would exchange with the trunkline carrier at the frequent common points on their respective systems. Substantially improved air transportation service could and would be afforded the air traveling public in New England, pursuant to the establishment of such pattern. All services presently being rendered could and would continue to be rendered, and, if the total traffic should increase (as is

anticipated), such services would be materially expanded. Separation of the trunkline from the local and feederline services within the region would enhance the value to the the public of both services. The trunkline services would be substantially improved, so far as concerns convenience and attractiveness, by the elimination of frequent intermediate stops and elimination of the need for compromising local service needs and trunkline service needs in the matter of scheduling. Improved trunkline service would, it is believed, be followed by increased patronage of the trunkline service, thus providing greater convenience and further attractiveness of air service, not only for persons residing in and near such trunkline service points but also for the traveling public residing in and about cities on the regional feederline system, whose service would necessarily be improved as the trunkline service expanded.

55 7. In an effort to achieve a New England air transportation service pattern conforming generally to the pattern hereinbefore in paragraph 6 hereof described, Northeast and Wiggins have entered into an agreement (hereinafter called the Agreement) (which is, and is stated to be, subject to the approval of this Board) which, in substance, provides for the transfer by Northeast to Wiggins, and the acquisition by Wiggins from Northeast, of Northeast's authority, pursuant to its certificate from route No. 27, to perform those air transportation services over said route which may properly be deemed local or feederline services, and the retention by Northeast of its authority, pursuant to its certificate for said route, to perform those air transportation services over said route which may, more properly, be deemed to be regional trunkline services. The Agreement, a copy of which is attached hereto, made part hereof and marked—Exhibit 1—also provides for the transfer to Wiggins, as an incident to the transfer of such operating rights, of certain tangible property presently situated at and used by Northeast at stations at which Wiggins will be either the principal, or the exclusive, operator, if the Agreement be approved and consummated.

The Agreement contemplates that trunkline service to Manchester, New Hampshire (when service to that city can be inaugurated) will be rendered on a north-south basis on Maine-New York schedules, but provides for no other change in Northeast's service pattern, other than those changes which result from the elimination of feeder-type intermediate points, and feeder-type segments. Such change in Northeast's trunkline service pattern is required by the public convenience and necessity.

The Agreement also contemplates that Northeast will retain the right to render service to Cape Cod and Island points from both Boston and New York during the summer months, in addition to the service which Wiggins will be authorized to render. The purpose of such retention is to enable Northeast to aid Wiggins in meeting the abnormally heavy summertime demand for service to and from this area.

* * * * * * * * * *

60 WHEREFORE, Northeast and Wiggins respectfully request that the Board give notice of, and assign for immediate hearing, this application and that, upon such hearing, the Board enter an order or orders herein:

(1) Approving the Agreement;

(2) Amending and modifying Northeast's present amended certificate of public convenience and necessity with respect to route No. 27, by using in lieu thereof two certificates of public convenience and necessity, the first of which (being a so-called regional trunkline certificate) shall be in or substantially in the form set forth in the Appendix to the Agreement marked "A" except that it shall also authorize air transportation service over route segments and to points which may be certificated to Northeast on or after the date of this application and on or before the date of issuance of such first certificate, and the second of which (being a so-called

feederline certificate) shall be in or substantially in the form set forth in the Appendix to the Agreement marked "B";

(3) Approving the transfer by Northeast to Wiggins of its so-called feederline certificate; authorizing Wiggins, by exemption order or otherwise, to render nonstop service between the following pairs of cities:

Fitchburg, Mass. and Worcester, Mass.
Fitchburg, Mass. and Keene, N. H.
Fitchburg, Mass. and Lawrence, Mass.
Keene, N. H. and Lawrence, Mass.
Worcester, Mass. and Hartford, Conn.
Worcester, Mass. and Providence, R. I.
Worcester, Mass. and Willimantic, Conn
61 Concord, N. H. and Fitchburg, Mass.
Worcester, Mass. and New London, Conn.
Willimantic, Conn. and New Haven, Conn.
Portland, Me. and Concord, N. H.

but subjecting Wiggins, upon such transfer to at least the following restrictions in the exercise of the rights and privileges granted to it by its certificates, including its certificate with respect to route No. 79;

(a) That the holder shall serve either Boston, Massachusetts or Worcester, Massachusetts on all flights which serve a point in Maine and a point in Rhode Island, Connecticut, New York (except Albany) or New Jersey, and

(b) That the holder shall on flights serving any of the following pairs of cities serve at least the following indicated number of intermediate points between such cities:

Boston and either New York-Newark or Bangor	4
New York-Newark and either Providence, New Bedford or Worcester	3
Burlington and either New York-Newark or Boston	3

Portland and either Boston, Bangor or Worcester 2

and

(c) That the holder shall not render nonstop service between points in the area comprising the states of Massachusetts, Rhode Island, Connecticut, New York and New Jersey, or between a point which the direct airport-to-airport mileage as set forth in the official mileage record adopted
62 by the Board, exceeds 65 miles; provided, however, that this restriction shall not apply to nonstop service (i) between Boston and Oak Bluffs or Nantucket or (ii) between New York and Riverhead, Oak Bluffs, Nantucket, Hyannis or Provincetown, provided that such nonstop service referred to in clause (ii) shall not be connecting service with nonstop service to or from Boston. Connecting service as herein used shall mean service providing connections within an hour.

(4) Granting such other and/or further relief consistent herewith as to the Board may seem meet and proper.

* * * * * * * * * *

73 "A"

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)

NORTHEAST AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail as follows:

(1) Between the co-terminal points Newark, N. J., and New York, N. Y., and the intermediate points Worcester, Mass., Providence, R. I., New Bedford, and Boston, Mass., Manchester, N. Y., and Portland and Bangor, Me.

(2) Between the terminal point Boston, Mass., and the intermediate point Burlington, Vt.

(3) Between the co-terminal points Newark, N. J., and New York, N. Y., the intermediate points Oak Bluffs, Nantucket, Hyannis and Provincetown, Mass., and the terminal point Boston, Mass. (during the period from June 15 to September 30 each year) to be known as route No. 27.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board, and may (1) begin or terminate or begin and terminate trips at points short of terminal points; (2) continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and (3) continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop
74 service was regularly scheduled by the holder between such point on the date of issuance of this certificate as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and may render scheduled nonstop service between any two points not consecutively named therein, between which such service is authorized hereby.

The exercise of the privileges granted by this certificate, as amended, shall be subject to the condition that the holder shall not serve Worcester, Mass., and New Bedford, Mass., on the same flights and to such other reasonable terms, conditions, and limitations required by the public interest as may, from time to time, be prescribed by the Board.

This certificate, as amended, shall be effective on the day of , 194 .

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and seal of the Board to be affixed thereto, attested by the Secretary of the Board, on this day of , 194 .

75 "B"

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended)
NORTHEAST AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property, and mail as follows:

(1) Between the co-terminal points Newark, N. J. and New York, N. Y., and the intermediate points Islip, N. Y., Stamford, Conn., Bridgeport, Conn., Riverhead, N. Y., New Haven, Conn., and (a) beyond New Haven, Conn., the intermediate points Waterbury, Conn., Hartford, Conn., Springfield, Mass., Northhampton, Mass., Greenfield, Mass., Keen, N. H., Claremont, N. H., White River Junction, Vt., Montpelier-Barre, Vt., and the terminal point Burlington, Vt., and (b) beyond New Haven the intermediate points New London, Conn., Newport, R. I., Providence, R. I., New Bedford-Fall River, Mass., Oak Bluffs, Mass., Nantucket, Mass., Hyannis, Mass., Provincetown, Mass., Boston, Mass., Lawrence, Mass., Portsmouth, N. H., Saco-Biddeford, Me., Portland, Me., Brunswick, Me., Lewiston-Auburn, Me., Rockland, Me., Augusta, Me., Waterville, Me., Belfast, Me., Bangor, Me., Millinocket, Me., Houlton, Me., Presque Isle, Me., and the terminal point Caribou, Me.

(2) Between the terminal point Boston, Msss., the intermediate points Lawrence, Mass., Manchester and Concord, N. H., White River Junction and Montpelier-Barre, Vt., and the terminal point Burlington, Vt.

(3) Between the terminal point Portland, Me., the intermediate points Lewiston-Auburn, Me., North Conway (during the period from June 1 to September 30 each year) and Berlin, N. H., St. Johnsbury and Montpelier-Barre, Vt., and the terminal point Burlington,
76 Vt. to be known as route No. 27-A.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board, and may (1) begin or terminate or begin and terminate trips at points short of terminal points; (2) continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and (3) continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein if nonstop service was regularly scheduled by the holder between such points on the date of issuance of this certificate as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and may render scheduled nonstop service between any two points not consecutively named herein, between which such service is authorized hereby.

The exercise of the privileges granted by this certificate, as amended, shall be subject to the following conditions: (1) that the holder shall not serve Brunswick, Me., Rockland, Me., or Belfast, Me., on the same flights with Lewiston-Auburn, Me., Augusta, Me., or Waterville, Me., and (2) that the holder shall serve at least three intermediate points on all flights service both New

York or Newark and Burlington, and shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may, from time to time, be prescribed by the Board.

This certficate, as amended, shall be effective on the day of , 194 .

77 In Witness Whereof, the Civil Aeronautics Board has caused this certficate, as amended, to be executed by its Chairman and the seal of the Board to be affixed thereto, attested by the Secretary of the Board, on this day of , 194 .

* * * * * * * * * *

Application of Eastern Air Lines, Inc., Docket No. 3501, Filed September 28, 1948.

147 3. Applicant is an air carrier of persons, property and mail in scheduled air transportation pursuant to certificates of public convenience and necessity heretofore issued to it by the Civil Aeronautics Authority (or the Board), authorizing it to engage in such air transportation on domestic Routes 5, 6, 10 and 47, on overseas Route F. A. M. 29 between Miami, Fla., and San Juan, Puerto Rico, and on a foreign route between New Orleans, La., and Mexico City, D. F.

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148 5. Applicant is constantly conducting research and study of the routes and services of its existing air transportation system and their relationship to the local, national and international air transport needs, with view to improving and expanding the same, in order that the system of Applicant may now and in the future efficiently, economically and conveniently make its full contribution to the program envisaged by Congress.

6. During their twenty years of air transport operation, Applicant and its predecessors in interest have developed the service from a small single-engine mail operation to air transportation of persons, property and mail by modern

airliners at higher speeds and over substantially expanded routes and to numerous cities which a decade ago were without air service.

7. As a further step in rounding out its improved service pattern for the greater convenience of a greater number of users of air transportation, Applicant hereby makes application for the amendment of certain of its existing routes, as follows:

8. Applicant hereby applies for amendment of its present certificate authorizations so as to remove all existing restrictions on Applicant's Route 5 operations and service to and from Boston, Mass., Providence, R. I., Hartford, Conn., and New Haven, Conn.

9. Applicant hereby applies for amendment of its present certificate authorizations so as to remove all existing restrictions on Applicant's Route 6 operations and service to and from Boston, Mass., Providence, R. I., Hartford, Conn., and New Haven, Conn.

149

10. Applicant seeks either permanent or temporary authority to perform unrestricted transportation in relation to said cities, as the Board may find appropriate under the circumstances. Applicant seeks said new and additional authorizations either as amendments to its existing Routes 5 and 6, or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston, as to the Board may appear desirable in the public interest.

11. Applicant is fit, willing and able to perform the air transportation proposed herein with its present Douglas DC-3 and DC-4 and Lockheed Constellation equipment, and such other equipment as it may subsequently acquire.

12. Prehearing conference has been held (September 17, 1948) in a proceeding now pending before the Board known as the "*Service in New England States Case*" (Docket 2196 *et al.*). This application is being filed within the time agreed upon at said prehearing conference for the filing of new and amended applications to be included in that proceeding. Inasmuch as this application proposes service

which is within the scope of said proceeding, Applicant prays that this application be consolidated therein for hearing and decision. Applicant is filing concurrently herewith a motion formally requesting such consolidation.

WHEREFORE, Applicant prays that the Board grant the authorizations sought in this application, and grant such other, further and different relief as the Board may deem appropriate.

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Application of Island Air Ferries, Inc., Docket No. 3518, Filed October 14, 1948.

152 2. Applicant is an air carrier holding a temporary certificate of public convenience and necessity, issued February 19, 1948, authorizing applicant to engage in air transportation with respect to persons and property between specified points over a route, known as Route No. 89.

3. Application is made herein for an amendment of applicant's certificate of public convenience and necessity so to authorize applicant to engage in scheduled air transportation of persons, property, and mail, as follows:

1. Between the terminal point Rye Lake, N. Y., the intermediate points LaGuardia Field and New York International Airport (Idlewild) both in New York, N. Y., Mineola, N. Y., Islip, N. Y., Westhampton, N. Y., East Hampton, N. Y., Montauk, N. Y., Southold, N. Y., Fisher's Island, N. Y., and the terminal point New London, Conn.

153 2. Between the terminal point, Islip, N. Y., the intermediate point, Bridegport, Conn. and the terminal point, New Haven, Conn., to be known as Route No. 89; thus amending applicant's certificate so as to authorize applicant to engage in air transportation with respect to mail, in addition to authorization heretofore made.

3. Application also is made herein for an amendment to applicant's certificate of convenience and necessity so that such certificate shall continue in effect for a period of three years from the date the holder inaugurates service pursuant thereto.

4. Applicant proposes to use conventional type aircraft and whatever other aircraft, conventional or otherwise, it considers appropriate in the circumstances. Applicant presently owns a DC-3 conventional type aircraft.

WHEREFORE, applicant prays that the Civil Aeronautics Board issue to and in the name of ISLAND AIR FERRIES, INC. an amendment to its temporary certificate of public convenience and necessity so as to authorize it to engage in the scheduled air transportation of persons, property, and mail between the terminal and intermediate points and on the proposed routes covered by the amendment herein and on such portions and combinations of such proposed routes and to such other points, and on such other routes as the Civil Aeronautics Board may
154 deem appropriate, specifically including those routes Northeast seeks to transfer to Wiggins; or for such other, further of different authority, certificates or relief as the Civil Aeronautics Baord may deem to be in the public interest.

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Application of Northeast Airlines, Inc., Docket No. 3519, Filed October 14, 1948.

157 1. In and by its application in Docket No. 871, which was consolidated with various other applications in *The New England Case* (decided by the Board by order adopted June 13, 1946), Northeast requested permanent or temporary certification over an integrated network of nine so-called local and feeder routes extending throughout the New England area, and included either as intermediate or ter-

minal points on certain of said nine proposed routes were the cities of Islip and Riverhead, on Long Island, New York, and the city of New London, Connecticut.

2. In its decision in *The New England Case,* the Board declined to certificate Northeast to serve over the local and feeder routes proposed in its application, but while so declining added to Northeast's then predominantly trunkline system and on a permanent basis, certain of the points which Northeast had proposed be served on a local and feeder basis. The cities of Islip, Riverhead, and New London, which Northeast had asked authority to serve if granted a local and feeder service authorization, were added as permanent additional intermediate points to Northeast's then predominantly trunkline segment between Boston and New York.

158 3. Northeast has not as yet inaugurated service at either Islip or Riverhead or at New London. In the case of New London, Northeast has been forced to defer service inauguration for only contact flying operations are possible up to the present time and such operations cannot constitute adequate service at so important a location. In the case of Islip and Riverhead, Northeast has intentionally deferred inaugurating service for economic reasons pending the conclusion of the pending investigation proceedings. Lacking the broad local and feeder service authorization which it sought in *The New England Case* and upon which its proposal to serve Islip and Riverhead was premised, Northeast has recognized that it can serve Islip and Riverhead, if at all, only as a part of its trunkline operation, and trunkline type service to Islip and Riverhead would not seem to be economically justified.

* * * * * * * * * *

159 WHEREFORE, Northeast prays that an order made and entered herein, effecting

(1) Authorization to Northeast to abandon service at the cities of Islip, New York, and Riverhead, New York, and

(2) Authorization to Northeast to abandon service at the city of New London, Connecticut, if the Board finds such abandonment to be in the public interest

if, either (a) the Board shall fail to approve that portion of the Northeast-Wiggins route pattern agreement which relates to the transfer of operating rights with respect to the cities of Islip, Riverhead and New London, or (b) Northeast and Wiggins fail to consummate said portion of said route pattern agreement within a period of one year commencing with the date of entry of the Board's order approving the same.

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Application of E. W. Wiggins Airways, Inc., Docket No. 2572, Filed October 16, 1946.

163 IV. Application is made herein for the amendment of applicant's certificate of public convenience and necessity for Route No. 79 so as to authorize scheduled air transportation of persons, property and mail as follows:

(a) By amendment to route segment #4 to change the terminal point from Springfield, Massachusetts to Hartford, Connecticut.

(b) By amendment to route segment #1 to add beyond the intermediate point Manchester, New Hampshire the intermediate points Concord, New Hampshire, Laconia, New Hampshire, North Conway, New Hampshire and the terminal point Berlin, New Hampshire,

(c) Between the co-terminal points New York, New York and Newark, New Jersey, the intermediate points White Plains, New York, Stanford-Norwalk, Connecticut, (provided that both White Plains, New York and Stanford-Norwalk, Connecticut, (provided that both White Plains, New York and Stanford-Norwalk, Connecticut shall not be served on the same flight) Bridgeport, Connecticut, New Haven, Connecticut, Meriden, Connecticut, (provided that both Waterbury, Connecticut and Meriden, Connecticut shall not be served on the same flight) and the terminal point Hartford, Connecticut.

(d) Between the terminal point Hartford, Connecticut the intermediate points Springfield, Massachusetts, Northhampton, Massachusetts, Pittsfield, Massachusetts, and the terminal point Albany, New York.

(e) Between the terminal point Hartford, Connecticut the intermediate points Springfield, Massachusetts, Northhampton, Massachusetts, Greenfield, Massachusetts, Orange, Massachusetts (provided that both Greenfield, Massachussets and Orange, Massachusetts shall not be served on the same flight) Keene, New Hampshire, Concord, New Hampshire, Laconia, New Hampshire, Sanford, Maine, Saco-Biddleford Maine and the terminal point Portland, Maine.

(f) Between the co-terminal points New York, New York and Newark, New Jersey the intermediaie points White Plains, New York, Stanford-Norwalk, Connecticut, (provided that both White Plains New York and Stanford-Norwalk, Connecticut shall not be served on the same flight) Danbury, Connecticut, Torrington,
164 Connecticut, Great Barrington, Massachusetts, Pittsfield, Massachusetts, Adams-North Adams, Massachusetts, Bennington, Vermont, Claremont, New Hampshire, White River Junction (Lebanon), Vermont, North Conway, New Hampshire and the terminal point Berlin, New Hampshire.

(g) Between the co-terminal points New York, New York and Newark, New Jersey the intermediate points Islip, New York, West Hampton, New York, East Hampton, New York, New London, Connecticut, Westerly, Rhode Island, Newport, Rhode Island, New Bedford-Fall River, Massachusetts, Plymouth, Massachusetts, and the terminal point Boston, Massachusetts.

V. In addition to the points named herein applicant is willing to serve any other point or points along the routes proposed or within the New England area at which the Board may deem the type of service proposed herein to be required by the public convenience and necessity.

VI. Applicant intends to render the proposed service with the equipment then in use on its Route No. 79, or other suitable equipment.

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Amendment No. 1 to Application of E. W. Wiggins Airways, Inc., Docket No. 2572, Filed June 23, 1947.

170 IV. Application is made herein for the amendment of applicant's certificate of public convenience and necessity for Route No. 79 as follows:

(a) So as to merge route segments 1, 2, 3 and 4 of Route No. 79 as presently constituted into a single route segment to be described as follows: "Between the terminal point Albany, N. Y., the intermediate points Bennington, Vt., Keene and Manchester, N. H., Adams-North Adams, Greenfield, Orange, Fitchburg, Lowell, Lawrence, Pittsfield, Northhampton, Springfield, Southbridge, Worcester, Framingham, Taunton and Brockton, Mass., Hartford and Willimantic, Conn., and Providence, R. I., and the terminal point Boston, Mass.," subject to the condition that each flight operated by the holder between two consecutive points now certificated to the same trunk carrier shall serve at least one intermediate point between such two points, unless exemption from this condition has been granted expressly by the Board; and subject further to the condition that each flight operated by the holder between the terminal points shall serve at least such number of intermediate points as the Board may determine.

171 (b) So as to add an additional route segment to Route No. 79 to be described as follows: "Between the terminal point Boston, Mass., the intermediate points Taunton, Brockton, Plymouth, New Bedford-Fall River, Framingham, Worcester, Southbridge, and Springfield, Mass., Providence, Newport and Westerly, R. I., Willimantic, New London, Hartford, Meriden, Waterbury, New Haven, Bridgeport, Stamford-Norwalk

and Danbury, Conn., Westchester, East Hampton, West Hampton and Islip, New York, and the co-terminal points New York, N. Y.-Newark, N. J.," subject to the condition that each flight operated by the holder between two consecutive points now certificated to the same trunk carrier shall serve at least one intermediate point between such two points, unless exemption from this condition has been granted expressly by the Board; and subject further to the condition that each flight operated by the holder between the terminal points shall serve at least such number of intermediate points as the Board may determine.

(c) So as to add an additional route segment to Route No. 79 to be described as follows: "Between the co-terminals New York, N. Y.-Newark, N. J., the intermediate points Westchester, N. Y., Stamford-Norwalk, Bridgeport, New Haven, Danbury, Waterbury, Meriden, Hartford, and Torrington, Conn., Great Barrington, Springfield, Pittsfield, Northhampton, Adams-North Adams, Greenfield, Orange, Fitchburg and Lowell, Massachusetts, Albany, N. Y., Bennington and White River
172 Junction, Vt., Keene, Manchester, Concord, Claremont and Laconia, N. H., and (a) beyond the intermediate point Laconia, N. H., the intermediate points Sanford and Saco-Biddeford, Me., and the terminal point Portland, Me.; and (b) beyond the intermediate point Laconia, N. H., the intermediate point North Conway, N. H., and the terminal point Berlin, N. H.," subject to the condition that each flight operated by the holder between two consecutive points now certificated to the same trunk carrier shall serve at least one intermediate point between such two points, unless exemption from this condition has been granted expressly by the Board; and subject further to the condition that each flight operated by the holder between the terminal points shall serve at least such number of intermediate points as the Board may determine.

(d) So as to alter the condition contained in applicant's present certificate of public convenience and necessity to eliminate the requirement that each terminal and intermediate point must be served on each flight and to substitute therefor a condition that the holder may begin or terminate, or begin and terminate, trips at points short of terminal points, except as otherwise prohibited by the Board in accordance with established procedure.

173 V. In the event that the Board desires to have a more rigid control over the pattern of operations to be conducted by applicant on Route No. 79 as amended, applicant is willing that the Board prescribe a procedure requiring submission of its original service pattern and any change made therein from time to time at some date prior to any such change.

VI. In addition to the points named herein applicant is willing to serve any other point or points along the routes proposed or within the New England area at which the Board may deem the type of service proposed herein to be required by the public convenience and necessity.

VII. The first purpose of the amendments requested herein is to permit applicant to render a flexible and convenient local service within the entire southern New England area instead of being confined to only a part of that area. The flexibility of operations envisioned by applicant will, because of the great number of combinations of points via which applicant would be able to operate schedules, permit effective and economic utilization of equipment which is now not possible. Secondly the amendments requested would permit applicant to render the optimum service with the minimum competitive effects upon trunkline carriers in that area. Of the 27 new points which applicant proposes to serve 10 have no certificated air service of any kind at the present moment. Moreover, amendment of the present Route No. 79 as requested would permit a practical service between 139 pairs of points now

on Route No. 79 but between which applicant cannot now operate. Of these 139 new services between cities now on Route No. 79 only 9 would duplicate presently certificated routes. Thirdly, the amendments requested herein will interject applicant into the primary directional traffic flow of southern New England and relieve it from com-
174 plete dependence upon a secondary directional traffic flow. The intercity traffic in southern New England follows primarily a northeast-southwest direction along the line of a Boston-New York route and the east-west flow along a Boston-Albany route is definitely secondary in character, being mostly to and from Boston. Fourthly, the addition of a second strong terminal, New York, would correct the directional unbalance in traffic presently existing on Route No. 79 and enable applicant to enjoy a more evenly distributed load factor. Fifthly, in that the temporary certificate of convenience and necessity held by applicant is experimental in nature, the amendments requested herein would provide the Board an opportunity to experiment with a flexible service plan and a principle of control by the Board which heretofore have not been tried. It appears to applicant that such an experiment is appropiate and within the scope of the Board's expressed policy with respect to the local-feeder experiment, and that it will contribute substantially to the experience upon which the Board must eventually establish its future policy.

VIII. Applicant intends to inaugurate the proposed service with the Douglas DC-3 aircraft especially converted for this purpose or with some more suitable type of aircraft in the event that any aircraft especially designed for local-feeder service is produced prior to the commencement of service.

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Amendment No. 2 to Application of E. W. Wiggins Airways, Inc., Docket 2572, Filed September 27, 1948.

182 IV. Application is made herein for the amendment of applicant's certificate of public convenience and necessity for Route No. 79 and for the amendment of the certificate of public convenience and necessity proposed to be transferred to applicant by Northeast in Docket No. 3337, as follows:

(a) So as to merge route segments 1, 2, 3 and 4 of Route No. 79 as presently constituted into a single route segment to be described as follows: "Between the terminal point Albany, N. Y., the intermediate points Bennington, Vt., Keene and Manchester, N. H., Adams-North Adams, Greenfield, Orange, Fitchburg, Lowell, Lawrence, Pittsfield, Northhampton, Springfield, Southbridge, Worcester, Framingham, Taunton and Brockton, Mass., Hartford and Willimatic, Conn., and Providence, R. I., and the terminal point Boston, Mass.," subject to the condition that each flight operated by the holder between two consecutive points now certificated to some trunk carrier shall serve at least one intermediate point between such two points, unless exemption from this condition has been granted expressly by the Board;

183 and subject further to the condition that each flight operated by the holder between the terminal points shall serve at least such number of intermediate points as the Board may determine.

(b) So as to authorize air transportation of persons, property and mail between the intermediate point Fitchburg, Mass. and the intermediate point Worcester, Mass.; between the intermediate point Fitchburg, Mass. and the intermediate point Concord, N. H.; between the intermediate point Fitchburg, Mass. and the intermediate point Keene,

N. H.; between the intermediate point Fitchburg, Mass. and the intermediate point Lawrence, Mass.; between the intermediate point Lawrence, Mass. and the intermediate point Keene, N. H.; between the intermediate point Worcester, Mass. and the intermediate point Hartford, Conn.; between the intermediate point Worcester, Mass. and the intermediate point Providence, R. I.; between the intermediate point Worcester, Mass. and the intermediate New London, Conn.; between the intermediate point Worcester, Mass. and the intermediate point New Haven, Conn.; between the intermediate point Concord, N. H. and the intermediate point Portland, Maine;

(c) So as to add Westerly, R. I., as an intermediate point on the route between Caribou, Maine, and New York, N. Y.-Newark, N. J., which is to be transferred to applicant by Northeast;

184 (d) So as to add Pittsfield, Mass. as an additional intermediate point on the route between New York, N. Y.-Newark, N. J. and Burlington, Vt. to be transferred to Wiggins by Northeast, and so as to extend said route from the intermediate point Keene, N. H. via the intermediate points Concord, N. H., Laconia, N. H. and North Conway, N. H. to the co-terminal point Berlin, N. H.; and

(e) So as to alter the condition contained in applicant's present certificate of public convenience and necessity to eliminate the requirement that each terminal and intermediate point must be served on each flight, and to substitute therefor a condition that the holder may begin or terminate, or begin and terminate trips at points short of terminal points and that the holder need not serve on any flight more than such reasonable number of intermediate points as the Board may from time to time determine.

V. In addition to the points named herein applicant is willing to serve any other point or points along the routes proposed or within the New England area at which the Board may deem the type of service proposed herein to be required by the public convenience and necessity.

VI. Applicant intends to inaugurate the proposed service with the Douglas DC-3 aircraft especially converted for this purpose or with some more suitable type of aircraft in the event that any aircraft especially designed for local-feeder service is produced prior to the com-
185 mencement of service.

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Application of E. W. Wiggins Airways, Inc., Docket No. 3004, Filed June 23, 1947.

196 3. Applicant is an air carrier holding a temporary certificate of public convenience and necessity duly issued June 13, 1946, authorizing applicant to engage in air transportation of persons, property and mail in scheduled operations on Route No. 79 for a period of three years from the date of inauguration of operations or from December 13, 1946, whichever date shall first occur.

4. Application is made herein for an amendment of applicant's present certificate of public convenience and necessity so as to eliminate therefrom the provision that the said certificate shall expire three years from a date six months after the effective date thereof, i. e., December 13, 1949, and so as to substitute for such limitation the provision that the duration of said certificate shall be a period of three years from the date of inauguration of operations thereunder.

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Petition of Eastern Air Lines, Inc., for Leave to Intervene in Docket 1279 et al., Filed November 3, 1947.

263 Pursuant to its certificate of public convenience and necessity for Routes 5 and 6 Petitioner engages in air transportation to, from and between Boston, Mass.,

Providence, R. I., Hartford, Conn. (and Springfield, Mass.), New Haven, Conn., New York, N. Y. and points south.

2. Applicant, WORCESTER YELLOW CAB COMPANY, INC., under Docket 1279, has filed an application to engage in air service between Worcester, Mass., and all points and places within a 50-mile radius of Worcester, on the one hand, and points and places in all states of the United States and Canada, on the other hand.

Prehearing conference has been held with respect to this application and other applications proposing air service for New England points and it is contemplated that all such applications will be heard in a consolidated proceeding under the lead Docket 1279.

3. The granting or denial of the application of Worcester Yellow Cab Company, Inc., and/or other applications which may be consolidated with that company's application under Docket 1279, may affect air transportation to, from and between New England points now served by Petitioner.

4. Petitioner has a property and financial interest in the subject matter of the application under Docket 1279 and other applications which may be consolidated with said docket for hearing and decision, which may not be adequately represented by existing parties and the intervention here requested will not broaden the issues or delay the proceeding.

5. Petitioner has not sooner filed this petition for leave to intervene because, until the scope of the proceeding was defined, it was not clear to Petitioner whether it should participate herein as an intervenor or as an applicant. This petition is being filed within a reasonable period after the prehearing conference.

264 WHEREFORE, Eastern Air Lines, Inc., prays leave to intervene in and to become a party to the above-entitled proceeding, including any consolidated proceeding which may result from the prehearing conference and the Board's Orders of Consolidation with respect

to Docket 1279, with the right to receive notice of and to appear at hearings, to produce, examine and cross-examine witnesses, to be heard upon and at oral argument, if oral argument is granted, and for such other, further, and different relief as the Board may deem appropriate.

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Prehearing Conference Report in Docket No. 1279 et al.,[1] Served November 6, 1947.

322 REPORT OF PREHEARING CONFERENCE HELD OCTOBER 21, 1947

This proceeding involves applications for certificates of public convenience and necessity and for amendments of certificates proposing air service in the general area of New England.

After appropriate notice, a prehearing conference in the above-entitled proceeding was held on October 21, 1947 in Conference Room C, Departmental Auditorium, Labor Building, Washington, D. C. The following noted appearances at this conference:

Edward T. Stodola, Examiner, presiding.
Gerald P. O'Grady and *Robert Jerrett, Jr.,* for E. W. Wiggins Airways, Inc.
Henry E. Foley for Northeast Airlines, Inc.
Leon W. Plympton, Jr. for New England Helicopter Service, Inc.
Robert L. Roy for Royal Air Lines.
Kenneth W. Bruning for Bruning Aviation, Inc.
Thomas H. Eliot for Skyway Corporation.
R. P. Baldwin for New England Central Airways System, Inc.
Martin Adlemen for Putnam Air Lines.
John T. Lorch and *James Francis Reilly* for United Airlines, Inc.

[1] Applications under following docket numbers were included in the letter giving notice of the prehearing conference: 1279, 1804, 1911, 1979, 2043, 2075, 2196, 2341, 2550, 2572, 2698, 2757, 2817, 2826, 2827, 2828, 2829, 2830, 2831, 2925, and 3004.

E. Smythe Gambrell for Eastern Airlines, Inc.
James K. Crimmins and *C. E. Fleming* for Transcontinental & Western Air, Inc.
Edwin McElwain and *Herbert Whitehead* for American Airlines, Inc.
Francis T. McAdams for Pennsylvania Central Airlines Corporation.
H. Heinrich Spang for Colonial Airlines, Inc.
Robert M. Howard for Rhode Island Port Authority, State of Rhode Island.
Frederick E. Batrus for the Post Office Department.
Greer M. Murphy and *Albert F. Grisard,* Public Counsel.

323 The following applicants were advised of the prehearing conference but were not represented and did not enter appearances: Worcester Yellow Cab Co., Inc., Docket No. 1279; Marine Airways, Docket No. 1804; William E. Towle (Inter-Coastal Airlines, Inc.) Docket No. 1911; Feeder Lines, Inc., Docket No. 1979; Samuel Frost Glover and A. Alan Grossman, Docket No. 2043; Maine Air Cargo Express, Inc., Docket No. 2341; and Northeast Aviation Company, Docket No. 2817. In communications to the examiner before the conference convened, R. P. Baldwin asked that his appearance be noted for New England Central Airways System, Inc., Docket No. 2196; and Martin Adleman requested that his appearance be entered in behalf of Putnam Air Lines, Docket No. 2757. Both of the latter applicants have indicated intention of prosecuting their applications in this proceeding. Northeast Aviation Company has requested definite postponement of consideration of its application filed under Docket No. 2817.

The examiner announced that this proceeding would be limited to applications seeking authority to provide new or additional service in the New England States. It was also announced that applications requesting routes outside of this general area would not be recommended for consolidation in this proceeding unless the service proposed was incidental to service in New England and in a region reasonably adjacent to cities in the New England States.

In view of the difficulties that inevitably arise in attempting to consider applications for both trunk-line service and local or feeder-line service in the same proceeding, the examiner stated at the outset that he would very likely recommend to the Board that this proceeding be limited to proposals for local or feeder-line services unless the trunk-line applicants could show that they would be adversely affected by such procedure.

324 In an application under Docket No. 3182 Northeast requests the addition of Bridgeport, New Haven, Hartford, and Springfield, as additional intermediate points between the co-terminal points New York/Newark and the intermediate point Worcester on Segment No. 1 (New York-Caribou) of its route No. 27. All the points sought to be added to Segment No. 1 are now intermediate points on Segment No. 5 (New York-White River Junction) of said route; the foregoing proposal would make them intermediate points on both Segments Nos. 1 and 5. Northeast also asks the addition of Manchester and Concord, N. H. (now intermediate points on Segment No. 3, Boston-Burlington) as alternate intermediate points between the intermediate points Worcester, Mass., and Portsmouth, N. H. on Segment No. 1, so that Manchester and Concord will be both alternate intermediate points on Segment No. 1 and intermediate points on Segment No. 3. Finally, Northeast requests the extension of Segment No. 5 to the new terminal point, Burlington, Vt., via, as intermediate points, the present terminal point White River Junction. and Montpelier, Vt., and the removal of the restriction which now requires each flight over Segment No. 5 to serve at least two intermediate points.

In Docket No. 2896 American asks for the designation of Providence and Hartford, as intermediate points between Boston and Springfield, on its route No. 7. United, in Docket No. 3044, asks the inclusion of Springfield as an intermediate point between Boston and Hartford on its

route No. 1. In an application under Docket No. 3136 Eastern requests that the present designation of Hartford as an intermediate point on its routes Nos. 5 and 6 be changed to Hartford-Springfield. TWA has a pending application under Docket No. 2313 requesting the extension of route No. 2 from New York/Newark to Boston.

325 Both Eastern and United presently serve Hartford from Bradley Field, a port approximately equidistant from Hartford and Springfield. American serves Hartford from Brainard Field and Springfield from the Barnes-Western airport. Since American now serves Springfield-Westfield as a separate stop from Hartford, Counsel for this carrier indicated that it would wish to have heard its application in Docket No. 2896 in any proceeding involving the designation of Hartford-Springfield as one intermediate point on Eastern's routes Nos. 5 and 6. It would appear that Eastern's proposal for the redesignation of the present intermediate point "Hartford" as "Hartford-Springfield" as well as American's application under Docket No. 2896 and United's application in Docket No. 3044 would more appropriately be heard in a separate proceeding.

Counsel for American further stated that the proposals of Wiggins under Docket No. 2572 involves competitive considerations with respect to a number of American's existing services in New England, and indicated American's desire to participate in this proceeding as an intervenor. Colonial has no application herein and took the position it would not intervene unless Northeast's application to extend Segment No. 5 of its route No. 27 to Burlington, Vt., is consolidated in this proceeding. TWA was agreeable to have its application under Docket No. 2313 heard in a separate proceeding, but this carrier likewise stated it would like to participate herein as an intervenor.

Aside from Northeast, there was no serious objection from any of the trunk-line applicants to limit the present proceeding to applicants for new or additional local and feeder-line service. Northeast took the position that its

proposals herein are so intimately related to the proposals of Wiggins that to exclude it from this proceeding would be highly prejudicial. Counsel for Northeast stressed
326 the fact that it has been classed as a regional carrier; that its existing services are largely local in character; and that its proposals herein involve promising improvements in its service pattern. He also pointed out that Northeast has set forth in a recent report to the Board what it believes to be certain defects in its route structure and that its proposals herein are an effort to correct some of these defects.

Wiggins has filed several applications for the amendment of its present temporary certificate for route No. 79. In Docket No. 2572[2] Wiggins proposes to merge the four route segments of route No. 79 into a single segment; to add additional route segments between Boston and New York as well as between New York and Berlin, N. H., and Portland, Me.; to alter the terms of the condition contained in its present certificate so as to permit it to begin and terminate, or begin or terminate, trips at points short of the terminal points; to provide that on each route segment each flight operated between two consecutive points now certificated to the same trunk carrier serve at least one intermediate point between such two points unless exemption from this condition has been granted expressly by the Board; and to further provide that each flight between the terminal points on each segment shall serve at least such number of intermediate points as the Board may determine. In Docket No. 3004 Wiggins requests the amendment of its certificate of public convenience and necessity for route No. 79 so as to provide that the said certificate shall expire three years after the date of inauguration of operations thereunder.

327 Under Docket No. 2550, Wiggins has applied for authority to conduct air transportation by helicop-

[2] Wiggins' application under Docket No. 2698 filed on December 6, 1946, is apparently superseded by the amendment filed on January 23, 1947, to the application originally filed under Docket No. 2572.

ter between the terminal point East Boston (Logan International Airport) and various points in eastern Massachusetts; in Docket No. 2827 Wiggins proposes service by helicopter between the terminal point Hillsgrove (Rhode Island State Airport) R. I., and various points in Rhode Island, eastern Connecticut and southeastern Massachusetts; in Docket No. 2828 Wiggins proposes helicopter service between the terminal point Albany (Municipal Airport) N. Y., and points in eastern New York and western Massachusetts; in Docket No. 2829 Wiggins requests authority to provide service by helicopter between the terminal point Brainard Field (Hartford) and a number of points in Connecticut; in Docket No. 2830 this carrier proposes helicopter service between the terminal point New Haven (Municipal Airport) Conn., and points in the general area of New Haven, Conn.; and in Docket No. 2831 Wiggins asks for authority to conduct helicopter operations between Westfield (Barnes Municipal Airport) Mass., and Springfield, Mass. and between the terminal point Westfield and points in the general Springfield area.

Under Docket No. 2075 Bruning Airways proposes air service limited to mail and property on a series of routes within New England and immediately adjacent areas. In an application filed under Docket No. 3137 Bruning proposes mail and property service between Boston and various cities as far west as Indiana; between New York City and points as far west as St. Louis, Mo.; between Cleveland and Milwaukee via various intermediate points; and between Fort Wayne, Ind., and Peoria, Ill., via several intermediate cities. When informed that the latter application was clearly beyond the scope of the present proceeding, this applicant was uncertain whether the application filed under Docket No. 2075 would be prosecuted in this proceeding. In the event this application is pressed,
328 applicant stated that it would be amended to omit, in general, the proposals for additional local service in southern New England. Since the date of the confer-

ence, Bruning has requested additional time (beyond the one week set at conference for the filing of new applications or amendments to applications already filed) in which to file an amended application.

In Docket No. 2196 the New England Central Airways System proposes "scheduled airline service" (presumably for mail, persons and property) between Boston and the cities Albany and Schenectady via Hartford, Conn., and between Boston and Bar Harbor, Maine, via a number of intermediate points. Counsel for this applicant, however, has likewise requested additional time in which to file an amended application.

In Docket No. 2757 Putnam Airlines proposes air service for mail, persons and property between Putnam, Conn., and points in Massachusetts, Connecticut and Rhode Island. Four routes are proposed; flights on each of these routes are to originate at Putnam; and two of the four proposed routes extend into New York City.

In an application filed under Docket No. 2826 the Skyway Corporation proposes air service for persons, property and mail by helicopter on four circular routes, each originating and terminating at Boston, Mass., and extending principally to various points in eastern Massachusetts. One of the proposed routes extends as far North as Exeter, N. H., and another south to Providence, R. I. New England Helicopter Service, in an application filed under Docket No. 3134 also proposes air service for persons, property and mail by helicopter on a number of routes in eastern Massachusetts and in Rhode Island.

329 Under Docket No. 2925 Royal Airlines requests authority for transportation of mail, property and persons on three routes between Boston and the terminal points, Eastport, Maine, Millinocket, Maine, and Burlington, Vt., respectively, via a number of intermediate points on each route.

Attention was drawn during the conference to the fact that Wiggins is not yet operating service for which it was certificated. Counsel for Wiggins stated that upon the

receipt of its temporary certificate on June 13, 1946, Wiggins proceeded immediately with preparations to inaugurate service but that a number of factors prevented it from beginning operations. Ten of the 22 points to which Wiggins was certificated had inadequate airports. Further Counsel stated that operations under Wiggins present route pattern would at best be marginal. Counsel for this carrier also stated that the adjustments in its present route structure contemplated by proposals in this proceeding are necessary to provide Wiggins with a route system which can be operated without excessive mail pay. Accordingly, Counsel urged an early hearing on the Wiggins applications herein.

It would appear that any general proceeding for additional local service in New England necessarily must involve consideration of the proposals of both Northeast and Wiggins. Indeed, an analysis of the presently certificated route patterns of these two carriers and their relation both to existing services in New England and to proposals for additional local service ought perhaps be the starting point in any effort to guage the needs of this era for additional local service. Moreover, it will obviously be necessary to give careful consideration to the status of all New England points already certificated but not yet receiving service. Accordingly, it is concluded that the proposals of Northeast under Docket No. 3182 need to be heard and considered in this proceeding.

330 Eight applications for helicopter service between various cities in New England will be considered in this proceeding. Counsel for the Post Office Department called attention to the fact that the Department, in cooperation with the U. S. Army, has conducted experiments in connection with carriage of mail by helicopter at Los Angeles, Chicago and New York City. At the present time the Los Angeles area is receiving helicopter service by a certificated carrier, and Counsel stated that the Post Office Department desires to await the results of these experiments prior to taking a stand for or against further service

of this nature in other parts of the country. Therefore, Counsel stated that the Post Office Department will not support any applications for additional helicopter service until sufficient operating experience has been had for a determination of the value and feasibility of the service already sponsored.

Counsel for the Skyway Corporation, one of the helicopter applicants herein, contended that since the helicopter services contemplated primarily mail and suburban commuting operations, they ought to be heard in a proceeding separate from the applications for local service which proposed conventional fixed-wing operations. Counsel for Wiggins opposed a separate proceeding for the helicopter applications, contending that since each of the helicopter applicants proposes inter-city service, competitive relationships which might arise from certification of one or other of the contemplated services require that both type of applications be heard in the same proceeding. There appears to be no over-riding reason for holding a separate proceeding for helicopter operations and, accordingly, the examiner will recommend that both applications for helicopter service and proposals involving conventional fixed-wing operations be consolidated in this proceeding.

331 The examiner will recommend to the Board that the applications under the following docket numbers be consolidated in this proceeding: 2550, 2572, 2757, 2826, 2827, 2828, 2829, 2830, 2831, 2925, 3004, 3134, and 3182. Pending receipt of amended applications in Dockets Nos. 2075 and 2196 from Bruning Airways and New England Central Airways System, respectively, no recommendation will be made with respect thereto. Further, unless good cause in writing for deferral is submitted to the examiner with respect to the application filed under Dockets Nos. 1279, 1804, 1911, 1979, 2043, 2817, and 2341 on or before the new date hereinafter set for the filing of amendments or new applications, the examiner will recommend to the Board that they be dismissed. Such dismissal, of course, will be without prejudice to later renewal or re-instatement.

Acting in behalf of the State of Rhode Island, a representative of the Rhode Island Port Authority urged that any proceeding with respect to additional air service in New England should give primary consideration to the situation that has developed regarding air service already certificated in the New England area. He pointed to the very considerable number of points in New England which were certificated in the *New England Case*[3] which now have no service and no immediate prospect of obtaining service. Accordingly, he urged that the present proceeding have the broadest possible latitude in order that appropriate action may be taken with respect to the matter of air service which has been certificated but is not being rendered.

As already noted, the examiner announced at the conference that amendments or new applications filed on or before October 28, 1947 would be accepted. However, since requests have been made that the date for filing amendments or new applications be extended, the examiner
332 rules that amendments or new applications may be filed until November 15, 1947. Petitions to intervene likewise are to be filed on or before November 15, 1947. Petitions to intervene already filed with respect to any one of the applications to be consolidated in this proceeding will be considered as sufficient application to intervene in the entire proceding as consolidated.

It is important that all applicants who would accept either a permanent or temporary certificate amend their applications accordingly. Likewise, all applicants who are willing to accept any routes in the general area encompassed by this proceeding should amend their applications to request such relief, but no applicant will be permitted to submit evidence concerning cities or routes not specifically mentioned in its application.

Any applicant having any relationship with either a surface carrier or a person engaged in any other phase of aero-

[3] 7 C.A.B. 27 (1946).

nautics prohibited by Section 408 of the Act should file a petition for approval of such relationship. Proof with respect to Section 408 should be submitted with the direct case and in conjunction with the evidence to be submitted under Section 401.

Public Counsel circulated a memorandum attached hereto as Appendix No. 1, indicating the nature of evidence deemed essential to the issues of public convenience and necessity, citizenship, and fitness, willingness, and ability. All parties agreed to incorporate into the record by reference a list of items prepared by Public Counsel attached hereto as Appendix No. 2.

It was agreed that the major portion of the direct case of each applicant would be in written form and that witnesses would be used primarily for the identification of exhibits, cross examination thereon, and the amplification of written testimony. All exhibits and other documents filed in this proceeding should comply with Section 285.3(c) of the Board's Rules of Practice. All pages of bound volumes of exhibits will be numbered consequtively
333 in the upper right hand corner preceded by the symbol indicating the name of the applicant or intervenor. The symbol to be used by each of the applicants is as follows:

Wiggins Airways	EWA
Northeast Airlines	NEA
New England Helicopter Service	NEH
Royal Airlines	RA
Bruning Aviation	BA
Skyway Corporation	S
New England Central Airways	NEC
Putnam Airlines	PA

Exhibits must be exchanged not later than January 15, 1948. Each party is requested to mail directly two copies of its exhibits to each of the other applicants and five copies to the examiner. Rebuttal exhibits will be exchanged in the same manner not later than January 31,

1948. Date for hearing is tentatively set for February 16, 1948, at Washington, D. C.

EDWARD T. STODOLA,
Examiner.

334 APPENDIX No. 1.

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 1279 et al.

In the matter of the application of

WORCESTER YELLOW CAB COMPANY, INC.

and other applications for certificates of public convenience and necessity and amendments to certificates under section 401 of the Civil Aeronautics Act of 1938, as amended.

STATEMENT OF ISSUES

Public Counsel believes the issues to be met by each applicant in this case may be stated as follows:

1. Is the applicant a citizen of the United States and is he fit, willing and able to perform the service for which he is applying?

2. Do public convenience and necessity require the route or routes applied for?

3. If public convenience and necessity require any route or routes, which carrier can best perform the service required?

Evidence which bears on these issues is listed below.

* * * * * * * * * *

Board Order Serial No. E-1048, December 10, 1947, in Docket No. 2196 et al.

344 It appearing to the Board that various applications proposing new or additional air services in the New England area can be advantageously and expeditiously determined in a single proceeding:

IT IS ORDERED,

1. That the portion of the application of Northeast Airlines, Inc., under Docket No. 3182, proposing the extension of segment No. 5 (New York-White River Junction) of route No. 27 of said carrier to the new terminal point, Burlington, Va., via, as intermediate points, the present terminal point White River Junction, and Montpelier, Vt., and the removal of the restriction requiring each flight on segment No. 5, to serve at least two intermediate points, be severed from Docket No. 3182 and assigned Docket No. 3214.

2. That the following applications be and hereby are consolidated in the above-entitled proceeding: Northeast Airlines, Inc., Docket No. 3182; E. W. Wiggins Airways, Inc., Docket Nos. 2572, 3004, 2550, 2827, 2828, 2829, 2830, and 2831; New England Central Airways System, Inc., Docket No. 2196; Putnam Airlines, Docket No. 2757; Royal Air Lines, Docket No. 2925; Skyway Corporation, Docket No. 2826; and New England Helicopter Service, Inc., Docket No. 3134.

It further appearing that the following persons have filed, pursuant to section 285.6(b) of the Economic Regulations, petitions for leave to intervene and have alleged matters indicating that they are persons entitled to become parties to the above-entitled proceeding:

345

American Airlines, Inc.; Eastern Airlines, Inc.; Transcontinental & Western Air, Inc.; the Postmaster General of the United States; the New England Conference of State Aviation Officials; the Aviation Committee of the New England Council; the State of Rhode Island; the State of New Hampshire; and the Monadnock Region Association.

IT IS FURTHER ORDERED, That American Airlines, Inc.; Eastern Airlines, Inc.; Transcontinental & Western Air, Inc.; the Postmaster General of the United States.; the New England Conference of State Aviation Officials; the Aviation Committee of the New England Council; the State of Rhode Island; the State of New Hampshire; and the

Monadnock Region Association, be and they hereby are granted permission to intervene in the above-entitled proceeding.

By the Civil Aeronautics Board:

M. C. MULLIGAN,
Secretary.

(SEAL)

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Board Order Serial No. E-1049, December 10, 1947, in Dockets 1279, 1911, 1979, 2043, 2075, 2341, 2698, 2817 and 3194.

346 A prehearing conference having been signed before an examiner of the Board on October 21, 1947, in Conference Room "C", Departmental Auditorium, Washington, D. C. in the matter of the applications of, *inter alia,* Worcester Yellow Cab Company, Inc. (Docket No. 1279), William H. Towle (Docket No. 1911), Feeder Lines, Inc. (Docket No. 1979), Samuel Frost Glover and A. Alan Grossman (Docket No. 2043), Bruning Airways (Docket No. 2075), Maine Air Corgo Express, Inc. (Docket No. 2341), E. W. Wiggins Airways, Inc. (Docket No. 2698), and Northeast Aviation Company (Docket No. 2817), for certificates of public convenience and necessity authorizing air transportation service generally in the New England States area, due notice having been given to all of said applicants that unless the said applications were pressed in the proposed proceeding described as the *Additional Service in New England States Case,* Docket No. 2196 *et al.,* or good cause in writing submitted for deferment of such applications, the examiner would recommend to the Board the dismissal of said applications; and all of said applicants having failed to appear at the prehearing conference or to show good cause for deferment; and

347 Northeast Airlines, Inc., having subsequent to the prehearing conference filed an application (Docket No. 3194) for a certificate of public convenience and necessity authorizing air transportation service in the area of Boston, Mass., for inclusion in the aforementioned *Addi-*

tional Service in New England States Case, and thereafter requested deferment of hearing thereon, but having failed to show good cause for such deferment;

IT IS ORDERED, That the applications herein be and they are hereby dismissed.

By the Civil Aeronautics Board:

M. C. MULLIGAN,
Secretary.

(SEAL)

* * * * * * * * * * *

Board Order Serial No. E-1149, January 26, 1948, in Docket 2196 et al.

348 The Board by Order Serial No. E-1048, dated December 10, 1947, having ordered consolidated into one proceeding various applications proposing air transportation by both helicopter and fixed-wing type aircraft; and

Skyway Corporation, Docket No. 2826, New England Helicopter Service, Inc., Docket No. 3134, and E. W. Wiggins Airways, Inc., Dockets Nos. 2550, 2827, 2828, 2829, 2830 and 2831, having requested that their applications for helicopter service be severed from the above-entitled proceeding and deferred for a later hearing; and

The following persons having filed, pursuant to section 285.6(b) of the Economic Regulations, petitions for leave to intervene and having alleged matters indicating that they are persons entitled to become parties to the above-entitled proceeding: American Airlines, Inc.; Eastern Air Lines, Inc.; Transcontinental & Western Air, Inc.; the Postmaster General of the United States; the New England Conference of State Aviation Officials; the Aviation Committee of the New England Council; the State of Rhode Island; the State of New Hampshire; the Monadnock Region Association; the Commonwealth of Massachusetts; the City of Laconia, N. H.; the Laconia Airport Authority; the White Mountains Region Association; the Merrimack Valley Region Association; and Island Air Ferries, Inc.

349 IT IS ORDERED, That the portion of Order Serial No. E-1048, including and following paragraph

numbered 2, dated December 10, 1947, be amended to read as follows:

"2. That the following applications be and they are hereby consolidated into the above-entitled proceeding and that said applications be assigned for hearing at a time and place to be hereafter designated before an examiner of the Board: Northeast Airlines, Inc., Docket No. 3182; E. W. Wiggins Airways, Inc., Dockets Nos. 2572 and 3004; New England Central Airways System, Inc., Docket No. 2196; Putnam Airlines, Docket No. 2757; and Royal Air Lines, Docket No. 2925;

"3. That the following applications proposing air transportation by helicopter be deferred for disposition in a separate proceeding: E. W. Wiggins Airways, Inc., Dockets Nos. 2550, 2827, 2828, 2829, 2830, and 2831; Skyway Corporation, Docket No. 2826; and New England Helicopter Service, Inc., Docket No. 3134; and

"4. That American Airlines, Inc.; Eastern Air Lines, Inc.; Transcontinental & Western Air, Inc.; the Postmaster General of the United States; the New England Conference of State Aviation Officials; the Aviation Committee of the New England Council; the State of Rhode Island; the State of New Hampshire; the Monadnock Region Association; the Commonwealth of Massachusetts; the City of Laconia, N. H.; the Laconia Airport Authority; the White Mountains Region Association; the Merrimack Valley Region Association; and Island Air Ferries, Inc., be and they hereby are granted permission to intervene in the above-entitled proceeding."

By the Civil Aeronautics Board:

M. C. MULLIGAN,
Secretary.

(SEAL)

* * * * * * * * * *

Board Order Serial No. E-1890, August 24, 1948, in Docket 2196 et al. and 3337.

355 Northeast Airlines, Inc., and E. W. Wiggins Airways, Inc. having filed on May 7, 1948 a motion for
356 deferral of hearings in the consolidated proceeding designated the *Additional Service in New England States Case,* Docket No. 2196 et al., until the disposition of the *Northeast-Wiggins Route Transfer Case,* Docket No. 3337, and

Public Counsel having filed on May 18, 1948 in the *Northeast-Wiggins Route Transfer Case,* Docket No. 3337, a motion requesting the Board to issue and publish a notice advising that the Board will entertain an application from any person interested in obtaining authority to operate the routes proposed to be transferred by Northeast to Wiggins upon the terms and conditions set forth in the agreement between said carriers dated May 1, 1948 or upon such other terms and conditions as the Board may find to be in the public interest; and

The Board finding that:

1. Northeast and Wiggins have failed to set forth in their motion for deferral of hearing grounds sufficient to warrant the granting of the relief requested therein;

2. The applications consolidated in the proceeding designated the *Additional Service in New England States Case,* Docket No. 2196 et al., and the application in the *Northeast-Wiggins Route Transfer Case,* Docket No. 3337, relate to air service in the New England area and can be advantageously and expeditiously determined in a single proceeding;

3. The circumstances presented in the *Northeast-Wiggins Route Transfer Case,* Docket No. 3337, are not appropriate for the utilization of the procedure suggested by Public Counsel in their motion filed on May 18, 1948;

It Is Ordered That:

1. The motion of Northeast and Wiggins for deferral of hearing in the consolidated proceeding designated

357 the *Additional Service in New England States Case,* Docket No. 2196 et al., be and it is hereby denied;

2. The applications in the consolidated proceeding designated the *Additional Service in New England States Case,* Docket No. 2196 et al., and the application in the *Northeast-Wiggins Route transfer Case,* Docket No. 3337, be and they hereby are consolidated into one proceeding to be known as the "Service in New England States Case", said case to be assigned for hearing before an examiner of the Board at a time and place to be designated hereafter;

3. The motion of Public Counsel filed on May 18, 1948 in the *Northeast-Wiggins Route Transfer Case,* Docket No. 3337, be and it is hereby denied.

By the Civil Aeronautics Board:

FRED A. TOOMBS
Acting Secretary

(SEAL)

* * * * * * * * * *

Motion of Eastern Air Lines, Inc., in Docket 2196 et al., for Consolidation for Hearing and Decision, Filed September 28, 1948.

360 Comes now Eastern Air Lines, Inc. ("Eastern") and moves the Civil Aeronautics Board ("the Board") to consolidate (for hearing and decision) its application of even date (in which Eastern proposed local service for Boston, Providence, Hartford/Springfield, New Haven and New New York/Newark) with the other applications to be heard by the Board in the proceeding under Docket 2196 *et al.,* known as the "*Service in New England States Case,*" and in support of its motion, Eastern respectfully shows to the Board the following:

I.

The proceeding known as the "*Service to New England States Case*"—hereinafter referred to as "this proceeding"—involves the establishment of additional air service in the New England area.

A second prehearing conference in this proceeding was held September 17, 1948 before the Assistant Chief Examiner, Thomas L. Wrenn. At that conference it was agreed that applications, and amendments to applications, to be heard in this proceeding would be filed ten days following the conference. Accordingly, Eastern is this day
361 filing an application to remove the restrictions on its Route 5 and Route 6 operations and services to and from Boston, Providence, Hartford/Springfield and New Haven. In the alternative, Eastern requests new local service routes between New York/Newark and Boston via New Haven, Hartford/Springfield and Providence.

Eastern's operations and services to and from Boston, Providence, Hartford/Springfield and New Haven are now subject to restrictions which permit service to such cities only on schedules which originate at Boston and serve also points south of Richmond and west of Charleston, West Virginia. The removal of the restrictions on Eastern's operations is vitally necessary in the public interest to allow Eastern to provide better local service for Boston, Providence, Hartford/Springfield and New Haven and to relieve Eastern from the onerous, unwarranted, and uneconomic operating burdens which the restrictions impose.

Eastern formally requests that the Board consolidate its application aforesaid with this proceeding for hearing and decision.

II.

The issues posed by Eastern's application are clearly within the scope of this proceeding.

This proceeding involves additional air service for New England cities, and Eastern proposes such service.

The application of New England Central Airways, Docket 2196, the lead docket in this proceeding, contemplates a Boston-New York (Westchester and Teterboro) operation via two intermediate stops (New Bedford and Bridgeport). Eastern's application contemplates Boston-New York operation via three intermediate stops.

According to the interpretation of its application by its counsel at the prehearing conference, the application of E. W. Wiggins Airways, Inc. to be heard in this proceeding contemplates operations between Boston and New York via four intermediate stops, three of which
362 (Providence, Hartford and New Haven) may be the same as the intermediate points proposed by Eastern.

It is therefore readily apparent that the scope of the proceeding, as delineated by applications which will be heard herein, is broad enough to encompass Eastern's application.

III.

Eastern's application not only involves issues substantially identical with those presented by other applications which have been consolidated into this proceeding, as pointed out in paragraph 2 of this motion, but it is also plain that the parties to a hearing on Eastern's application would be identical with the parties which are already involved in this proceeding. Therefore, orderly administrative process requires hearing on Eastern's application in this proceeding.

IV.

The consolidation of Eastern's application into this proceeding for hearing and decision is necessary to prevent prejudgment. Since Eastern proposes local service within New England which is also proposed by other applicants in this proceeding, it would be manifestly unfair and prejudicial to Eastern to allow other applicants a hearing on their applications without, at the same time, granting Eastern a hearing on its application.

It is true that Eastern's proposal involves the question of the improvement of Eastern's services between points south of New York/Newark on the one hand (Trenton, Philadelphia, Atlantic City, Wilmington, Baltimore, Washington, Richmond and Charleston, W. Va.) and the New

England points on the other. However, the Board should not discriminate against Eastern's local service proposal and refuse to consolidate it into this proceeding for hearing and decision merely because Eastern proposes both local and semi long-haul services in its application.

363 The Board has clearly stated that it will abide by the principles of fair play and give itself the opportunity of determining comparative public interest by consolidating for hearing and decision applications such as Eastern's with other applications such as are involved in this proceeding. In the *Investigation of Local, Feeder and Pick-up Air Service,* 6 C.A.B. 1, 2 (1944) the Board said:

> "Inasmuch as the Board has since adopted the general practice of hearing in a consolidated proceeding all applications proposing service in the same general area, it does not appear necessary to consider further the population limitation proposed by the Examiners. A consolidated proceeding affords full opportunity to consider the character of services proposed by the various applicants and the relationship of the type of each service to the air transportation needs of the individual cities or towns. If a need for long-haul or through service is apparent, this need can be provided for by designating the city as a stop on one or more existing routes. At the same time the need for service of a local character can be weighed in conjunction with local service proposals."

The Board also recognized the need for comparing the services proposed by "local service" applicants with improvements in service proposed by "trunk-line" carriers when it deferred consideration of the applications of certain non-operating companies in the *Great Lakes Area* case, Docket 335 *et al,* decided September 3, 1947, until consideration of the applications of Capital for improvements in its services within the area similar to the im-

provements in services which Eastern here proposes (pp. 70-72 of mimeographed opinion).

The sound principles of procedural due process set forth by the Supreme Court in *Ashbacker Radio Corporation v. Federal Communications Commission,* 326 U. S. 327 (1945) also require the consolidation of Eastern's application in this proceeding.

V.

The Board certainly should give itself the opportunity of weighing the public interest factors involved in the applications of Eastern and the other applicants and,
364 most important, give itself the opportunity, if additional local service is needed, to provide that service in the most economical and efficient manner. The over-all difference between the granting of Eastern's application in this proceeding and the granting of the applications of the other companies might easily amount to several million dollars annually in cost to the government.

The taxpayers have an interest in this case in which certain "feeder" lines seek to carry mail, passengers and property that Eastern is now carrying, or proposing to carry, without government subsidy, whereas the feeders seek millions of dollars as annual subsidy for their proposals.

There should be no hesitation on the part of the Board in affording itself the opportunity to make the soundest decision possible in the public interest. To secure that opportunity it is necessary that Eastern's application be heard in this proceeding with the applications of the other parties hereto.

Fairness to all applicants demands that all seeking to serve the same points be heard together and that there be no prejudgment in favor of one, before the other can be heard.

Fairness to the public and the taxpayer demands that all applications be carefully considered before any carrier

is selected, in order that the very best service may be authorized at the least expense to the taxpayers.

WHEREFORE, Eastern prays that the Board consolidate for hearings and decision in this proceeding Eastern's application filed this day proposing improved local service for New England points.

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Motion of American Airlines, Inc., in Docket 2196 et al., to Dismiss, Filed October 14, 1948.

367 The Board should support the Examiner's recommendation and should discuss Eastern's motion to consolidate for hearing and decision with the *Service in New England States Case* its application for a removal of all restrictions on its operations over Routes 5 and 6 to and from Boston, Providence, Hartford/Springfield and New Haven. The primary purpose of Eastern's application is to obtain unlimited participation in the Boston-New York and Boston-Washington markets, and such an application has no place in a proceeding otherwise involving nothing but feeder-type services. Eastern seeks authorization for no service that is not already authorized over the routes of at least one carrier. It seeks to add no new points to its own routes; its application does not envisage feeder-type service and would not even require Eastern to provide a truly local service.

368 I

Eastern was originally certificated into New England in the *Additional Service to Boston Case,* 4 C.A.B. 686 (1944). At that time the Board established a restriction limiting Eastern's service to Boston to flights originating south of Richmond or west of Charleston, W. Va., because, it stated specifically, "the primary purpose of extending Eastern's service from New York to Boston is to enable it to provide an improved service for through travelers from Boston to points south of Washington on the Eastern system." (4 C.A.B. at p. 695).

When Eastern was certificated into Providence in the *New England Case,* 7 C.A.B. 27, 36 (1946), this same restriction was applied for precisely the same reason. Scarcely was the ink dry on the decision in that case when Eastern came back to the Board in the first of its series of efforts to eliminate the restriction. Upon Eastern's petition for reargument and reconsideration of the Board's decision in that case, the Board found that direct one-carrier service from Hartford and New Haven to the "resort areas of Florida and to the Carolinas and other southern states active in the textile industry not served by American Airlines is required by the public convenience and necessity." The Board found for a third time that Eastern's service should be restricted and stated specifically "such a condition will best assure the provision of the needed new one-carrier service while protecting American Airlines from unnecessary and destructive duplication of its services to Boston, New York and Washington and to points between." *New England Case,* Supplemental Opinion, 7 C.A.B. 439, 440-441 (1946).

369 Not daunted by the consistent position taken by the Board, Eastern sought an unrestricted service to points in New England for the fourth time in the *Middle Atlantic Area Case,* decided February 19, 1948, Serial No. E-1211. Once more, less than one year ago, Eastern's proposal was again rejected by the Board for reasons directly applicable to its present move. The Board stated:

> "It must be recognized that the restriction does limit the ability of Eastern to compete for local traffic between Boston and New York or for traffic between New England points and points between New York and Washington. However, as stated before, Eastern was authorized to serve New England to meet the needs of long-haul travelers to this area and the restriction was intended to limit its participation in the local traffic. To permit Eastern at this time to inaugurate unrestricted operations between Washing-

> ton, New York and New England points would undoubtedly increase the volume of service between these points and place an additional competitive burden upon American and Northeast between these points." Mimeographed opinion, pp. 53-54.

And, less than two months ago, Eastern's petition for reconsideration of the Board's action was denied. *Middle Atlantic Area Case,* Supplemental Opinion, decided August 26, 1948, Serial No. E-1904.

There is, of course, nothing in the Civil Aeronautics Act or in the Board's regulations to prevent a carrier from re-filing a rejected application as many times as it wishes to do so. We do suggest, however, that under the circumstances Eastern's motion to consolidate its most recent attempt to obtain authority which the Board has repeatedly denied it with a case pending before the Board is nothing more than frivolous. It is difficult to conceive of any facts which Eastern can now place before the Board in
370 support of its application which its competent counsel have not already presented. If Eastern wishes to pursue this application, it is, of course, free to do so, but we fail to see why Eastern is entitled to expedited treatment of its application through the device of consolidating it with the *Service in New England States Case*—a case which has an entirely different purpose.

II

In groping for some method to suggest that it is now offering something new Eastern urges that the present proceeding is a "local service" proceeding, passes over lightly the "semi-long haul services" which it proposes between Boston and Washington and Boston and New York and argues that if Eastern's application to provide "local service" is not consolidated with this proceeding the Board will discriminate against it. This line of reasoning does not even have the merit of superficial plausibility. The applications which already have been consolidated into

this proceeding involve the certification of feeder-type service to a large number of small points in New England. Thus, New England Central Airways System proposes to serve some 34 points in the New England area on 9 different route segments. Royal Airlines seeks to serve approximately 22 points on 3 different route segments north of Boston and Putnam Airlines proposes service for 19 points in New England via 7 different route segments all radiating out of Putnam, Connecticut. E. W. Wiggins Airways, Inc., proposses to add 30 points in New England to its present certificate thereby allowing it to serve a total of 52 points in the New England area.

371 Eastern requests no new intermediate points and it does not suggest that it will be willing to accept a requirement that it provide point to point service—a requirement which Eastern well knows has been established in every feeder certificate awarded by the Board. Instead, paragraphs 8 and 9 of Eastern's application request the removal of "all existing restrictions" on Routes 5 and 6 and paragraph 10 specifically requests authority "to perform unrestricted transportation."

Wherefore, American moves that the Board dismiss Eastern's motion for consolidation for hearing and decision of its application in Docket No. 3501 with the *Service in New England States Case.*

* * * * * * * * * *

Prehearing Conference Report in Docket 2196 et al., Served September 30, 1948.

374 SERVICE IN NEW ENGLAND STATES CASE,
DOCKET NO. 2196 ET AL[1] AND DOCKET NO. 3337

REPORT OF PREHEARING CONFERENCE
HELD SEPTEMBER 17, 1948

This is a consolidated proceeding in which are included (1) certain applications for new or additional air routes

[1] Application under the following docket numbers are also covered by this lead docket: 2925, 2757, 2572, 3004, and 3182.

in the New England area, as to which a prehearing conference had been held on October 21, 1947, and (2) the application for approval of a so-called route pattern agreement, dated May 1, 1948, between Northeast Airlines, Inc. and E. W. Wiggins Airways, Inc.

After appropriate notice, a prehearing conference in the above-entitled proceeding was held on September 17, 1948, in Conference Room A, Departmental Auditorium, Labor Building, Washington, D. C. In the absence of Examiner E. T. Stodola, who called the conference, Assistant Chief Examiner, Thomas L. Wrenn presided. The following noted appearances at this conference:

Gerald P. O'Grady for E. W. Wiggins Airways, Inc.
Henry E. Foley for Northeast Airlines, Inc.
Coates Lear for New England Central Airways System, Inc.
Wood T. Henry for Island Air Ferries, Inc.
Henry I. Stimson for Skyway Corporation.
E. Smythe Gambrell and *Harold L. Russell* for Eastern Air Lines, Inc.
Joseph Reilley for United Airlines, Inc.
E. W. Jennes and *S. B. Stewart* for American Airlines, Inc.
G. Bruce Steuart for the Massachusetts Aeronautics Commission.
Julian Cromelin for the Post Office Department.
F. Harold Bennett for the Air Line Pilots Association, International.
James L. Crawford for the Brotherhood of Railway and Steamship Clerks.
Albert F. Grisard, William F. Kennedy and *Robert J. Benes,* Public Counsel.

Putnam Airlines and the New England Council advised by letter that they could not be present at the conference but expressed interest in the proceeding. Putnam also requested that its appearance be noted for the purposes of the conference.

375 By Orders Serial No. E-1048, dated December 10, 1947, and Serial No. 1149, dated January 26, 1948, the Board consolidated under Docket No. 2196 et al, the following applications for new or additional local air services in the general area of New England: New England Central Airways System, Docket No. 2196; Putnam Airlines, Docket No. 2757; Royal Airlines, Docket No. 2925; Northeast Airlines, Inc., Docket No. 3182; and E. W. Wiggins Airways, Inc., Docket Nos. 2572 and 3004. Applications for new or additional long-haul service to and from New England were excluded from the foregoing proceeding; similarly, the Board deferred a number of applications proposing air service by helicopter in the New England area for disposition in a separate later proceeding.

When the applications consolidated under Docket No. 2196, et al, were about to be set for hearing, Northeast and Wiggins requested that the date for the exchange of exhibits in that proceeding, then assigned for February 27, 1948, be indefinitely postponed. In the meantime, Northeast and Wiggins had entered into negotiations for the transfer from Northeast to Wiggins of certain local and feeder line services in New England. On May 7, 1948, the two carriers filed a so-called route pattern agreement. It is contemplated that if the Board approves this agreement, Northeast will transfer to Wiggins and Wiggins will acquire from Northeast many of Northeast's present operating rights with respect to local and feeder line services in New England and that subsequent to such transfer, Northeast will perform an exclusively regional trunk line operation in New England and Wiggins will perform an area-wide regional local and feeder line service. In addition to the transfer of certain of Northeast's operating rights under its present certificate, the route pattern agreement contemplates the creation of a number of new services

376 between various points in the New England area and the abandonment of certain services between pairs of points now included in Northeast's present certificate.

By Order Serial No. E-1890 under date of August 24, 1948, the Board consolidated the applications under Docket No. 2196, et al, and the route transfer application filed by Northeast and Wiggins under Docket No. 3337, into one proceeding to be known as the *Service in New England States Case.* Subject prehearing conference resulted from that order. Both the new route applications and the route transfer application then will be considered and heard in one proceeding.

Counsel for Northeast directed attention to the fact that the Board's order of December 10, 1947, had severed Paragraph 4(c) of its application under Docket No. 3182, leaving only Paragraph 4(a) and (b) to be considered. Counsel stated that Northeast is planning to withdraw Paragraph 4(a) which involves additional service between New York and Boston. However, he stated that such withdrawal is contingent upon the Board's action with respect to Eastern's request, hereinafter discussed, to file and have heard in this proceeding an application to remove certain restrictions on its operation between Boston and New York. In the event Eastern's proposal is heard in this proceeding, Northeast will not withdraw Paragraph 4(a) of its application.

Counsel for Wiggins stated that the carrier will prosecute its applications under Dockets Nos. 3004 and 2572, both of which were consolidated into this proceeding and that it plans to amend its application under Docket 2572 to conform to provisions of the Northeast-Wiggins route pattern agreement with respect to the integration of Wiggins' route No. 79 and the routes proposed to be acquired from Northeast under that agreement, particularly with respect to service from Worcester to the cities of Providence, New Haven, Fitchburg, and Keene. Counsel for Wiggins also stated that he would file an amendment to include Westerly, R. I. as an intermediate point
377 on its present route No. 79.

Counsel for Island Air Ferries requested that its application under Docket No. 3256 be consolidated and

heard as a part of this proceeding. This application asks for authority to engage in scheduled air service between any airport owned or operated, or hereafter owned or operated, by the Port of New York Authority. Counsel for Wiggins opposed the inclusion of Docket No. 3256 in this proceeding, stating that that application presents possibilities for an extension of the scope of this proceeding by opening the door for other local service proposals in the New York area. He pointed out that there is no necessary relationship between Docket No. 3256 and the instant proceeding and that Island Air Ferries can not be prejudiced by any action which the Board may take in the present proceeding without at the same time considering the application under Docket No. 3256. Under the circumtances, the examiners will recommend that the application filed under Docket No. 3256 be excluded from this proceeding.

Counsel for Island Air Ferries also referred to the statement on page 85 of the mimeographed opinion of the *Middle Atlantic Area Case*[2], wherein it is stated: "In view of the failure of Northeast to institute service to New London, Riverhead, and Islip on route No. 27 since our authorization in June 1946, and in view of the experimental authorization herein, we will institute a proceeding under sections 401 (g) and 401 (h) of the Act to determine whether or not these points should be removed from the certificate of Northeast." Counsel stated that Island Air Ferries will formally move that the investigation referred to in the foregoing quotation be instituted and consolidated for hearing with the present proceeding. Counsel further stated that Island Air Ferries plan to file an application with the Board for authority to serve the points involved in the proposed route transfer between Northeast and Wiggins.

[2] Docket No. 674, et al, decided February 19, 1948.

378 Counsel for New England Central proposed that proceeding be limited in scope to New York City on the south, the State of Maine on the north and the western part of the State of New York—namely, the cities of Rochester and Buffalo—on the west. He was granted ten days time in which to file an amended application which would involve proposals to provide air service for western New York. He was advised that action to consolidate such an application would be dependent upon the effect of his proposals on other applications, namely, whether inclusion of proposals to serve western New York cities would necessitate consideration of other applications on file and affecting air transportation in that area.

It would appear that the inclusion of applications to provide service for cities in western New York State would enlarge the geographical scope of the proceeding as originally contemplated under Docket No. 2196 et al. Accordingly, the examiners will recommend that the proceeding as consolidated be confined in its western boundary to cities in eastern New York State, including such cities as Albany, Schenectady, New York, White Plains and other cities in the geographical vicinity of said points.

Counsel for Eastern requested that Eastern be allowed several days within which to file an application for removal of the restrictions upon its operation between New York and Boston and stated that Eastern will request such application to be considered and heard in the present proceeding. Counsel for Northeast and American expressed opposition to Eastern's proposal and pointed out that a similar proposal by Eastern had but recently been denied by the Board. The examiner presiding stated that in view of Northeast's statement that it was withdrawing paragraph 4 (a) of its application under Docket No. 3182, he was unable to see any relation between the proceeding as it now stands and Eastern's proposal, and that in his opinion the Eastern proposal would enlarge the scope
379 of the proceeding. Counsel for Eastern stated that the application would be filed with a motion that it

be consolidated with the present proceeding and the examiner then indicated that in view of the circumstances as set forth, he would be unable to recommend that it be included in this proceeding. As hereinbefore indicated, Counsel for Northeast stated that if Eastern's application for the removal of the restriction in question is heard in this proceeding, Northeast would not withdraw paragraph 4 (a) of its application under Docket No. 3182.

Counsel for United stated that United is not now planning to intervene in the proceeeding and that it takes no position with respect to the proposed route transfer application under Docket No. 3337 but it wished to reserve the right to request leave to participate in this case in the event that amendments to be filed present competitive considerations to United. Counsel for American stated that American would not oppose the route transfer at this time. Counsel for Eastern took the position that as the proceeding now stands Eastern opposes the route transfer under Docket No. 3337 but may change its position when it sees proposed schedules and plans of operation.

Counsel for the Post Office Department stated that the Department feels that no new service is needed at present to points not now served in New England but that the Department expects to list certain points which, if served, would afford the best service to the Post Office Department for the movement of mail. He also stated that the Department takes no position with respect to the proposed transfer of routes from Northeast to Wiggins.

In response to questions by several Counsel present it was made clear that under the Board's order of August 24, 1948, which, in addition to setting up the present consolidated proceeding, denied a motion of Public Counsel to set up a procedure permitting consideration of other transferees than Wiggins for the services proposed
380 to be transferred by Northeast, carriers other than Wiggins may not now be substituted as possible alternative transferees under the route transfer proposal.

The transfer agreement contains a termination date of

October 1, 1948 in the event the Board fails to approve the transfer and acquisition thereunder by said date. However, Northeast and Wiggins have mutually agreed to extend the termination date to June 1, 1949.

Public Counsel distributed to all parties a statement of issues and a request for evidence[3] with respect to that portion of this proceeding involving the route transfer agreement. Parties to the transfer agreement agreed to proceed to trial of the issues involved on the basis of the statement of issues worked out by Public Counsel and they further agreed to submit the evidence requested except request No. 10 (e) with respect to Wiggins' operation and requests Nos. 7 (e) and 8 (e) with respect to Northeast's operation. It was agreed that the submission by Wiggins of over-all expense estimates under item 10 (d) and revenue estimates under item 10 (f) of the evidence requests would constitute adequate cost and revenue information to serve as a forecast of Wiggins' operations over the routes proposed to be acquired. In lieu of items 7 (c) and 8 (c) with respect to the operation of Northeast, this carrier agreed to submit data on the over-all effect of the proposed agreement on its costs and net income. Public Counsel's statement of issues and request for evidence are attached hereto as Appendix No. 1.

Among other things, Public Counsel requested that the exhibits of Northeast and Wiggins contain a detailed statement of all the services involved in the proposed route transfer, including all of Northeast's operating rights proposed to be transferred, new operating rights to be granted by approval of the route transfer agreement, services to be abandoned, and new services to be created under the exemption order proposed by the agreement. Counsel for Northeast and Wiggins agreed to provide detailed exhibits on the exact effect of the proposed

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[3] Public Counsel called attention to certain typographical errors appearing in their requests for evidence, to wit: The phrase reading "not now served" in the fourth line of item No. 9 in the requests relating to Wiggins, should read "not now authorized"; similarly, the phrase "not now served" in item No. 6 in the requests relating to Northeast should read "not now authorized to be served."

transfer agreement on the present air transport pattern of the New England area.

Counsel for the Air Line Pilots Association stated that his organization would like to request Northeast and Wiggins to explain in their exhibits how the pilot personnel of these two carriers may be affected by the proposed route transfer either in the way of reassignment, transfer or reduction of pilot personnel. Counsel for the Brotherhood of Railway and Steamship Clerks indicated that his organization is also interested in the same type of information. The examiner presiding suggested that Counsel for the two carriers involved and the two labor organizations affected confer for the purpose of reaching an agreement between the carriers and the two organizations in advance of the hearing on the issue raised by the labor organizations. All Counsel expressed intention of discussing the matter and reaching an agreement if possible.

A representative of Massachusetts Aeronautics Commission expressed the desire that the hearing in this consolidated case be held in Boston. He stated that adequate facilities could be furnished for the hearing. He also requested that the Board arrange for an expeditous hearing in this matter.

The following parties have already been granted permission to intervene in the proceeding under Docket 2196, et al, and, accordingly, will be permitted to participate as formal parties in the consolidated proceeding under Docket No. 2196 et al., and Docket No. 3337: American Airlines, Inc.; Eastern Air Lines, Inc.; Trancontinental and Western Air, Inc.; the Postmaster General of the United States; the New England Conference of State Aviation Officials; the Aviation Committee of the New England Council; the State of Rhode Island; the State of New Hampshire;
382 the Monadnock Region Association; the Commonwealth of Massachusetts; the City of Laconia, N. H.; the Laconia Airport Authority; the White Mountains Region Association; the Merrimack Valley Region Association; and Island Air Ferries, Inc.

In addition, petitions for leave to intervene in the proceeding under Docket No. 3337 have been filed by the Air Line Pilots Association, the Brotherhood of Railway and Steamship Clerks, the New England Conference of State Aviation Officials, and Island Air Ferries, Inc. Skyway Corporation has filed a petition to intervene in the proceedings under Docket No. 2196, et al. Persons seeking leave to intervene in either the proceedings under Docket No. 3337 or Docket No. 2196, et al, will be considered as having requested leave to intervene in the proceeding as consolidated by the Board's order of August 24, 1948. The examiners will recommend to the Board that the following persons also be granted permission to intervene in the consolidated proceedings: Air Line Pilots Association, International; the Brotherhood of Railway and Steamship Clerks; and Skyway Corporation.

Persons wishing to file new applications or motions to consolidate other applications already on file with the present consolidated proceeding are directed to file appropriate documents not later than October 4, 1948. Parties to this proceeding are further advised that exhibits are expected to be exchanged not later than November 8, 1948. The date for formal hearing is hereby tentatively assigned for November 29, 1948.

Parties are directed to notify Public Counsel within 30 days from the date of prehearing conference of any requests for material to be stipulated as part of the record in this proceeding. Copies of such requests are to be sent to all other parties of record. Public Counsel will
383 then prepare a proposed stipulation of various items of evidence for submission to the parties at the hearing.

THOMAS L. WRENN
Asst. Chief Examiner

EDWARD T. STODOLA
Examiner

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Motion of State of Rhode Island in Docket No. 2196 et al., for Consolidation for Hearing and Decision, Filed November 15, 1948.

403 The Rhode Island Port and Industrial Development Commission, representing the State of Rhode Island, an intervener in this proceeding, hereby moves that the Board consolidate the application of Eastern Air Lines, Inc., under Docket 3501 in this proceeding for hearing and decision. In support of this motion the State of Rhode Island presents the following facts:

I.

Eastern's application under Docket 3501 is to remove the restriction which now prevents it from operating to and from Providence and other New England cities, schedules which would be set for the particular convenience of those cities. Under the restriction, Eastern's schedules serving Providence must also serve Boston on the north and points south of Richmond or west of Charleston, West Virginia on the south. This means that Providence now receives and can receive no Eastern service originat-
404 ing or terminating in Providence—service suit to the convenience of Providence passengers. It also means that Providence has no effective competitive service to and from New York, Boston or other points in the New England area. Apparently Eastern is the only carrier which could provide effective competition for American Airlines, for Northeast Airlines, Inc., the only other carrier serving Providence to and from New York, provides only one schedule per day in each direction.

II.

Providence is entitled to improved service to and from New York and New England points, and it is entitled to schedules designed for its convenience—not mainly the convenience of Boston or distant points to the south and west. The State of Rhode Island is prepared to prove that,

on the schedules of Eastern which serve Providenec, the traffic which originates or terminates at Providence predominates, and that passengers travelling to and from Providence and Boston would be better served if some of those schedules were to originate and terminate in Providence rather than Boston.

III.

Other applications for additional and improved service between Providence and New York and between Providence and other New England points are under consideration in this proceeding. The State of Rhode Island believes that it is imperative in the public interest that Eastern's application also be considered. It would be prejudicial to the State of Rhode Island, as well as to Eastern, if all applications proposing additional local service in the New England area were not heard together.

IV.

Some parties to this proceeding have objected to inclusion of Eastern's application on the ground that the proposed service has been previously rejected by the
405 Board. That certainly is no reason for denying consolidation in this proceeding. Many proposals have received repeated consideration by the Board, and some eventually have been authorized. It has never before been seriously contended that hearing should be denied merely because a similar application was previously rejected. Actually, there has thus far been no adequate hearing on Eastern's request for removal of the restriction on its Providence services. At the time of the original Eastern authorization to serve Providence there was of course no evidence as to the effect such a restriction would have on the carriers involved or on the travelling public. Also, when the record was made in the *Middle Atlantic Area* proceeding, Eastern had not been certificated to serve Providence and there were no operating statistics which would show the effect of the restriction. Yet this is the only pro-

ceeding in which the Board has had an opportunity to consider the restriction on Eastern's service to New England cities. Today there is ample evidence that the restriction is a great and unjustifiable burden on the travelling public, and results in unnecessary expense to Eastern and the public. That evidence should be heard in this proceeding.

V.

Eastern's application cannot be excluded on the ground that it involves the removal of a restriction while other applications propose entirely new service. In the first place, removal of Eastern's restriction will permit the provision of entirely new service—local schedules tuned to the convenience of the New England cities—which is precisely within the scope of this proceeding. In the second place, the proceeding already embraces at least one application to remove restriction. The application of E. W. Wiggins Airways under Docket 2572 proposes (in the language of the prehearing conference report of November 6, 1947)

406 "to alter the terms of the condition contained in its present certificate so as to permit it to begin and terminate, or begin or terminate, trips at points short of the terminal points." If Wiggins' proposal to provide turn-around service to and from intermediate points on its New England routes is to be considered, why should not Eastern's application to remove a similar restriction also be included?

VI.

Eastern's application cannot be excluded on the ground that it involves long-haul service and therefore is different from the other applications in this case. Actually, Eastern's application is for a new route between New York/Newark and Boston, as Paragraph 10 of its application under Docket 3501 states that Eastern seeks the new authorizations "either as amendments to its existing Routes 5 and 6, or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Bos-

ton, as to the Board may appear desirable in the public interest." As a new route application, Eastern's proposal is no different than the application of New England Central Airways under Docket 2196, which proposes a Boston-New York-Newark route via New Bedford and Bridgeport (using the Westchester and Teterboro airports as the New York and Newark terminals). Moreover, it would be strange and most unreasonable if the Board were to exclude an application which proposes the same service proposed by others, merely because it also proposes additional service. If the Board were to adopt such a policy of exclusion, consolidations of new route applications would become virtually impossible. The Board's past practice furnishes no precedent for such a policy, but rather requires the consolidations here requested.

VII.

The State of Rhode Island is vitally interested in Eastern's proposal to remove the New England restric-
407 tion, and respectfully urges the Board to grant this motion and to consider Eastern's application in this consolidated proceeding.

* * * * * * * * * * *

Board Order Serial No. E-2201, November 17, 1948, in Docket 2196 et al.

411 Eastern Air Lines, Inc., hereinafter called "Eastern," having filed with the Board on September 28, 1948, a motion requesting consolidation in the above-entitled proceeding of its application, Docket No. 3501, for amendment of its certificates of public convenience and necessity for routes Nos. 5 and 6 so as to remove all restrictions on service to Boston, Mass., Providence, R. I., Hartford, Conn., and New Haven, Conn.;

Island Air Ferries, Inc., hereinafter called "Island", having filed on October 14, 1948, an application, Docket No. 3518, for authority to carry mail on route No. 89 and to extend the effective period of the certificate of public con-

venience and necessity for route No. 89; and Island having previously filed, on October 4, 1948, a motion to, *inter alia,* consolidate the aforesaid application in Docket No. 3518 in the above-entitled proceeding;

Island having also requested in the aforesaid motion that the Board institute immediately the proceeding referred to in its opinion of February 19, 1948 (Order Serial No. E-1211) in the *Middle Atlantic Area Case,* Docket No. 674 *et al.,* to remove New London, Conn., Riverhead, N. Y., and Islip, N. Y., from the certificate of public convenience and necessity for route No. 27, and having requested that the Board consolidate the proceeding to remove such points in the above-entitled proceeding for hearing and decision;

412 E. W. Wiggins Airways, Inc.,, hereinafter called "Wiggins", having by letter dated October 19, 1948, requested the dismissal of the joint application of Wiggins and Northeast Airlines, Inc., hereinafter called "Northeast," under Docket No. 3337 for approval of the route transfer agreement between said two carriers, and Northeast having assented to such request by telegram dated October 21, 1948;

Wiggins having requested by letter dated October 19, 1948, leave to withdraw amendment No. 2 to its application, Docket 2572, and to substitute a revised application under said Docket No. 2572;

Northeast having filed on October 14, 1948, an application, Docket No. 3519, requesting authority to abandon the cities of Islip, N. Y., Riverhead, N. Y., and New London, Conn., on route No. 27;

American Airlines, Inc., hereinafter called "American", having filed on October 14, 1948, a motion to dismiss the aforesaid motion of Eastern for consolidation of Docket No. 3501 in the above-entitled proceeding; and

Skyway Corporation, the Air Line Pilots Association, the Brotherhood of Railway and Steamship Clerks, and Colonial Airlines, Inc., hereinafter called "Colonial", having filed, pursuant to section 285.6(b) of the Economic Regula-

tions, petitions for leave to intervene in the above-entitled proceeding;

The Board, upon consideration of the aforesaid motions, applications, petitions and requests, finding that:

(1) Consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the score of the above-entitled proceeding;

(2) In view of the fact that Northeast has made application in Docket No. 3519, for abandonment of service to certain points, which application is hereinafter consolidated in the above-enitled proceeding, there is no occasion for the Board to institute a new proceeding on its own initiative to determine whether the points in question should be removed from the certificate of Northeast;

(3) Grant of the request by Wiggins to amend its application in Docket No. 2572 is necessary and in the public interest in order to give proper consideration to the changed circumstances resulting from withdrawal of the transfer agreement, Docket No. 3337;

413 (4) The application of Northeast in Docket No. 3519, requesting abandonment of service to the aforementioned points, and the application of Island in Docket No. 3518, can be advantageously and expeditiously considered in the above-entitled proceeding;

(5) Skyway Corporation has alleged matters indicating that it is a person entitled to become a party to the above-entitled proceeding;

(6) Colonial has failed to allege matters indicating that it is a person entitled to become a party to the above-entitled proceeding; and

(7) In view of the dismissal, hereinafter ordered, of the application of Northeast and Wiggins in Docket No. 3337 previously consolidated in the above-entitled proceeding, the Air Line Pilots Association and the Brotherhood of Railway and Steamship Clerks do not have a substantial interest in the subject matter of such proceeding so as to entitle them to become parties thereto pursuant to section 285.6(b) of the Economic Regulations;

IT IS ORDERED:

1. That the aforesaid motion of Eastern to consolidate its application in Docket No. 3501 in the above-entitled proceeding be and it is hereby denied;

2. That the motion of Island filed October 4, 1948, except insofar as the action taken herein constitutes the granting thereof, be and it is hereby denied;

3. That Island's application, Docket No. 3518, be and it is hereby consolidated into the above-entitled proceeding;

4. That the joint application of Wiggins and Northeast, Docket No. 3337, be and it is hereby dismissed;

5. That amendment No. 2 to the application of Wiggins in Docket No. 2572 be and it is hereby dismissed, and that Wiggins be and it is hereby granted leave to further amend its application in said docket: *Provided That* said amended application shall not propose services beyond the score of the issues in the above-entitled proceeding, as defined in the prehearing conference reports served November 7, 1947 and September 30, 1948: *And Provided Further That* said amended application shall be filed with the Board on or before November 30, 1948;

414 6. That the application of Northeast in Docket No. 3519 be and it is hereby consolidated in the above-entitled proceeding;

7. That the aforementioned motion of American, except to the extent it is granted herein, be and it is hereby denied;

8. That the aforementioned petition of Colonial to intervene be and it is hereby denied; and

10. That the aforementioned petitions of the Air Line Pilots Association and the Brotherhood of Railway and Steamship Clerks to intervene be and they are hereby denied;

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
Secretary

(Seal)

* * * * * * * * * * *

Board Order Serial No. E-2308, December 21, 1948, in Docket 2196 et al.

415 Eastern Air Lines, Inc., ("Eastern") having filed with the Board on September 28, 1948, a motion requesting consolidation in the above-entitled proceeding of its application, Docket No. 3501, for amendment of its certificates of public convenience and necessity for routes Nos. 5 and 6 so as to remove all restrictions on service to Boston, Mass., Providence, R. I., Hartford, Conn., and New Haven, Conn.;

The Board by Order Serial No. E-2201, dated November 17, 1948, having denied Eastern's motion to consolidate its application in Docket No. 3501 in the above-entitled proceeding on the ground that the requested consolidation would have unduly expanded the issues and broadened the scope of the above-entitled proceeding;

The Rhode Island Port and Industrial Development Commission, representing the State of Rhode Island, having filed with the Board on November 15, 1948, a motion for consolidation of Eastern's application in Docket No. 3501 in the above-entitled proceeding for the purpose of hearing and decision;

The Board upon consideration of all matters set forth in the aforementioned motion of the Rhode Island Port and Industrial Development Commission filed November 15, 1948, finding that consolidation of Eastern's application, Docket No. 3501 would unduly expand the issues and broaden the scope of the abovementioned proceeding;

416 It is ordered, That the aforementioned motion of the Rhode Island Port and Industrial Development Commission be and hereby is denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
Secretary

(Seal)

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BRIEF OF EASTERN AIR LINES, INC., PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 10099

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

Petition for Judicial Review of Orders of the Civil Aeronautics Board

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
825 Citizens & Southern National Bank Building,
Atlanta, Georgia.

LLEWELLYN C. THOMAS,
Hibbs Building,
Washington, D. C.

Attorneys for Eastern Air Lines, Inc.

GAMBRELL, HARLAN & BARWICK,
825 Citizens & Southern National Bank Building,
Atlanta, Georgia,
Of Counsel.

April 6, 1949

United States Court of Appeals for the District of Columbia Circuit
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Joseph W. Stewart
CLERK

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FOR THE DISTRICT OF COLUMBIA

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—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

Petition for Judicial Review of Orders of the Civil Aeronautics Board

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BRIEF OF EASTERN AIR LINES, INC., PETITIONER

Jurisdictional Statement

This is an appeal (pursuant to petition for review filed by Eastern Air Lines, Inc. (Eastern) on January 14, 1949) from two orders of the Civil Aeronautics Board (the Board) denying the motions of Eastern and the State of Rhode Island for consolidation of Eastern's new route application under Docket 3501 for hearing and decision in a proceeding designated as *"Service in New England States* case, Docket 2196 *et al."* ("the proceeding under Docket 2196"), in which, among other things, several applicants are seeking certificates of public convenience and necessity authorizing scheduled air transportation of persons, property and mail to, from and between certain points in the

New England area and points adjacent thereto in New York, New Jersey, Canada and elsewhere.

The Board has consolidated for hearing and decision in the proceeding under Docket 2196 various applications involving additional local service between Boston, Massachusetts on the one hand and New York, New York and Newark, New Jersey on the other via intermediate points, and has refused to consolidate in that proceeding Eastern's timely application under Docket 3501 which involves the same type of service between the same points.

This Court's jurisdiction is based on Section 1006 of the Civil Aeronautics Act (49 U. S. C. 646) and on Section 10 of the Administrative Procedure Act (5 U. S. C. 1009).

Statement of the Case and the Proceedings Below

Eastern is engaged in interstate transportation of persons, property and mail pursuant to certificates of public convenience and necessity issued by the Board, among which are certificates for Route 5 (Boston to Texas points via Providence, R. I., Hartford, Conn., New Haven, Conn., New York, N. Y., Newark, N. J. and numerous other intermediate points) and Route 6 (Boston to Miami, Florida via Providence, Hartford, New Haven, New York and Newark and numerous other intermediate points). Such certificates are subject to a restriction (R. 4*) which prohibits Eastern from providing local service suited to the convenience of Boston, Providence, Hartford, New Haven, New York and Newark in relation to each other. The restriction is as follows:

> "the holder shall serve Boston only on flights originating or terminating south of Richmond or west of Charleston [W. Va]; . . . the holder shall serve Providence, Hart-

* The Joint Appendix will be so cited throughout this brief.

ford and New Haven only on flights originating at Boston and terminating south of Richmond or west of Charleston or on flights originating south of Richmond or west of Charleston and terminating at Boston."

The Board initiated a proceeding, variously designated from time to time but ultimately known as *"Service in New England States* case, Docket 2196, *et al."*, which was to consider "applications seeking authority to provide new or additional service in the New England States . . . and in a region reasonably adjacent to cities in the New England States" (R. 55). Two prehearing conferences were held, October 21, 1947 and September 17, 1948, for the purpose of defining the scope and issues of the proceeding. The second Prehearing Conference Report (R. 84) defined the geographical scope as "confined in its western boundary to cities in eastern New York State, including such cities as Albany, Schenectady, New York, White Plains and other cities in the geographical vicinity of the said points."

In the second Prehearing Conference Report (R. 88) the Examiner set a deadline of October 4, 1948 for the filing of applications to be consolidated in the proceeding under Docket 2196. Prior to that deadline, Eastern filed (September 28, 1948) its application under Docket 3501, requesting in paragraphs 8 and 9 (R. 40) that the Board "remove all existing restrictions" on Eastern's Route 5 and Route 6 "operations and service to and from Boston, Mass., Providence, R. I., Hartford, Conn., and New Haven, Conn.," and stating further in paragraph 10 (R. 40) that Eastern "seeks said new and additional authorizations either as amendments to its existing Routes 5 and 6 or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston, as to the Board may appear desirable in the public interest." Eastern's application requested (R. 41) "such other, further and different relief as the Board may deem appropriate".

Simultaneously with its application under Docket 3501, Eastern filed a motion (R. 71) requesting that the Board consolidate said application with the proceeding under Docket 2196. The State of Rhode Island, an intervener in the proceeding, filed a motion on November 15, 1948 (R. 89) also requesting that the Board consolidate Eastern's application under Docket 3501 with the proceeding under Docket 2196.

By orders of November 17, 1948 (R. 92) and December 21, 1948 (R. 96) the Board denied the motions of Eastern and the State of Rhode Island and refused to consolidate Eastern's application under Docket 3501 with the proceeding under Docket 2196, stating that "consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the scope" of the proceeding under Docket 2196.

The Board's orders of consolidation (R. 65-67, 68-71) placed in the proceeding under Docket 2196 the following applications:*

(a) An application (R. 19) of New England Central Airways System, Inc., under Docket 2196, which was amended (R. 22) on November 18, 1947, to seek a route from Boston to New York (Westchester) and Newark (Teterboro) via certain intermediate points;

(b) An application (R. 23, 24) of Putnam Airlines, under Docket 2757 for routes between New York City and various points in Connecticut, Rhode Island and Massachusetts;

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* At the hearing on Docket 2196, which began on March 28, 1949, the record of which is not included in this appeal, it appeared that some of the applicants are not pressing their applications in the form filed. However, the basic Boston-New York/Newark route sought by Eastern's application under Docket 3501 is still involved under several applications, and the discussion in this brief, which is based on the applications as filed and as they existed at the time of the Board orders complained of, would be unchanged except in insignificant factual details even if the record herein reflected all proceedings in Docket 2196 to date.

(c) An application (R. 26) of Northeast Airlines, Inc., under Docket 3182 to add Bridgeport, New Haven and Hartford as intermediate points on its New York-Boston-Caribou (Maine) Route 27;

(d) An application (R. 44, 46, 50) of E. W. Wiggins Airways, Inc., under Docket 2572 to add certain route segments between Boston and New York on its Route 79, and to amend the restriction which now prohibits Wiggins from beginning or terminating trips short of terminal points and from omitting certified stops;

(e) An application (R. 31) of Northeast Airlines, Inc. and E. W. Wiggins Airways, Inc. under Docket 3337 whereby Northeast would transfer certain of its routes to Wiggins, would acquire certain new authorizations, would abandon certain services, and would thereafter "perform an exclusively regional trunk line operation in New England and Wiggins will perform an area-wide regional local and feeder line service" (Prehearing Conference Report, R. 81).

The last application subsequently was abandoned by the parties and dismissed by the Board at their request (R. 92-95).

Subsequent to refusing consolidation of Eastern's application under Docket 3501, the Board consolidated in the proceeding the application of Massachusetts Airlines under Docket 3604 (see Supplement B to this brief, pages 46, 49) for a route, among others, between New York and Boston via various intermediate points.*

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* The application of Massachusetts Airlines under Docket 3604 is not included in the Joint Appendix for the reason that it was filed after the orders here complained of, and was not certified by the Board as part of the record in this case. However, it indicates the scope of the proceeding and it is a part of the official files of the Board. Therefore it is printed for the Court's convenience in Supplement B to this brief, together with certain related documents also filed or issued since the orders here under review. It is understood that the Board has no objection to reference to such materials, and, indeed, some are printed at the Board's request.

Although the Board denied the request of Eastern and the State of Rhode Island that Eastern's application under Docket 3501 be consolidated with the proceeding under Docket 2196, the Board granted an earlier request of Eastern (R. 52) for leave to intervene in that proceeding. The obvious effect of such rulings of the Board is that Eastern may participate in the proceeding under Docket 2196 only for the purpose of defending its *existing* services from duplication by the applicants in the proceeding, but not for the purpose of presenting the merits of its application under Docket 3501. Any other interpretation would be inconsistent with the Board's assertion that Eastern's application would "expand the issues and broaden the scope of the proceeding under Docket 2196".

The hearing under Docket 2196 commenced March 28, 1949 (Supplement B, page 52).

Eastern seeks herein permission to participate in Docket 2196 as an applicant, and not merely as an intervener limited to presentation of defensive material. It is Eastern's firm belief that such participation is essential in order that Eastern's application under Docket 3501 shall not be foreclosed by the granting of other applications in the proceeding under Docket 2196, and in order that Eastern shall not thus be denied its statutory and constitutional right to a fair hearing on its application. Such participation may be granted in a re-opened phase of the hearing under Docket 2196, without delaying final decision in that proceeding.

Statutes Involved

The following statutory provisions, pertinent parts of which are fully quoted in Supplement A to this brief, are involved: Civil Aeronautics Act, Sections 2, 205 (a), 401 (a), (b), (c), (d) and (h), 404 (a), 1001, 1002 (i), 1005 (f),

1006 (a) and (b); 49 U. S. C. 402, 425, 481, 484, 641, 642, 645, 646.

Administrative Procedure Act, Sections 3 (a), 6 (d), 10 (a), (b), (c) and (e); 5 U. S. C. 1002, 1005 and 1009.

Points Relied upon by Petitioner

The Board's orders herein complained of are erroneous and should be set aside for the following reasons:

(1) Refusal of the Board to grant hearing on Eastern's Boston-New York/Newark local route application concurrently with the like applications which have been consolidated in the proceeding under Docket 2196 would effectively deny Eastern a hearing on its application and would foreclose Eastern's proposal.

(2) The Board's published rules of procedure require consolidation of Eastern's application in Docket 2196, and such rules are binding on the Board.

(3) Denial of consolidation of Eastern's application with Docket 2196 would deprive Eastern of its statutory right to hearing and decision "as speedily as possible".

(4) The Board cannot perform its statutory duties in furtherance of the public interest without considering the merits of Eastern's application along with the like applications consolidated in Docket 2196.

(5) The Board's orders denying consolidation of Eastern's application are not supported by findings as required by law.

(6) Eastern is entitled to judicial review now, and should not be required to wait until its application has been prejudiced by delay and the grant of other applications.

Summary of Argument

Eastern's application under Docket 3501 for a Boston-New York/Newark local service route is for the same route which five other applicants are seeking in the proceeding under Docket 2196. The services, and the types of relief for which authorization is sought, likewise are the same. Yet, although Eastern's application was filed in ample time, the Board has refused to consolidate it for hearing with the other applications, and has restricted Eastern to the role of limited intervener so that Eastern is unable to present the merits of its own application. The Boston-New York/Newark local service route is certain to be granted to some applicant in Docket 2196, and there is no practical possibility that the Board would thereafter grant Eastern's application also. Hence, the failure of the Board to consolidate Eastern's application in the proceeding under Docket 2196 amounts to denial of Eastern's right to a hearing on its application, contrary to the principle established in *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327 (1945).

The Board's published rules of procedure require that "all pending applications for a similar service in the same general area" be heard together (Board's Organizational Regulations, Section 302.7 (b) (2)). The Board as a matter of usual practice has heard such applications together. The Board's procedure is binding on the Board (Administrative Procedure Act, Section 3 (a)) and cannot lawfully be departed from.

The Civil Aeronautics Act requires (Section 401 (c)) that the Board dispose of Eastern's application "as speedily as possible". The speediest and most convenient manner of disposing of Eastern's application is in the proceeding under Docket 2196. Justice also requires such concurrent disposition of Eastern's proposal.

The Board is required by the Civil Aeronautics Act (Section 2) to give effect to comparative considerations, and "the comparative public interest". This the Board cannot do without comparing Eastern's application with the other applications for the same service.

The Board's denial of Eastern's request for consolidation is based on the bald conclusion that consolidation of Eastern's application would "unduly expand the issues and broaden the scope" of the proceeding under Docket 2196. That conclusion is not only erroneous, but it is not a finding of fact such as is required by law. Civil Aeronautics Act, Section 1005 (f); Administrative Procedure Act, Section 6 (d); *Saginaw Broadcasting Company* v. *Federal Communications Commission,* 68 App. D. C. 282, 96 F. (2d) 554 (1938).

Eastern is entitled to judicial relief now, because the Board's orders denying consolidation amount to a final foreclosure of Eastern's right to a hearing and to participation as an applicant in the proceeding under Docket 2196. Postponement of judicial relief until after the Board had granted another application in Docket 2196 would place on Eastern the unlawful "greater burden" of seeking to establish the merits of its application in a hearing which for all practical purposes would be a "rehearing on the grant of the competitor's license", contrary to the holding in the *Ashbacker* case, *supra.* For very practical reasons, Eastern could not hope to be successful on such a "rehearing", because the Board would then be committed to a course of action, the successful applicant would have made expenditures in reliance on the certificate granted, and history shows that under such circumstances the Board *never* withdraws the granted authorization.

ARGUMENT

I.

Eastern's Statutory and Constitutional Right to a Hearing on Its Application Would Be Effectively Denied if that Application Were Not Consolidated for Hearing and Decision with the Proceeding Under Docket 2196.

Eastern's right to a hearing on its application under Docket 3501 is set out in Section 401 (c) of the Civil Aeronautics Act as follows: "Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible".

The nature of the hearing to which Eastern is entitled is described in *Morgan* v. *United States,* 304 U. S. 1, 19 (1938) as follows: "Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense, but with respect to those fundamental requirements of fairness which are of the essence of due process".

This Court, in *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission,* No. 9464, decided October 7, 1948, likewise has held most decisively that the right to a hearing in administrative proceedings is the same as the broad right granted by the courts in judicial proceedings, and this Court stated (page 8):

> "The due process guarantee of hearing in our system of law has always been recognized as a right in persons, not a privilege to be extended to persons according to the *ex parte* judgment of tribunals as to whether or not there should be a hearing. It is a personal right of access to the courts or to administrative tribunals, a right at the minimum to present one's claim of injury or threatened injury and to be heard to argue in sup-

> port of the proposition that the allegations thereof, assuming their truth, are legally cognizable, *i.e.*, state a 'cause of action.' This right of hearing accorded by the due process clause is one of the few rights guaranteed by our Constitution which are substantially absolute. . . . The right stems also in recognition of the fact that soundness of decision is promoted by hearings, that tribunals are fallible and need, in order to administer justice according to law, the aid of argument on questions of law and on the meaning of the evidence if the trial of fact issues is reached."

It will be demonstrated hereinafter that the Board's treatment of Eastern's application under Docket 3501 does not accord with judicial standards; that the Board has arbitrarily excluded Eastern's application from a proceeding in which other applicants are allowed to contend for a new route which is the same as the one for which Eastern is denied the right to contend; that courts consistently allow all parties claiming an interest in the same subject matter to present their full claim to such matter in a single proceeding, whereas the Board has prohibited Eastern from presenting its claim to the route involved in Docket 2196; that the route which Eastern is seeking in its application under Docket 3501 is certain to be awarded to some applicant in the proceeding under Docket 2196, and that any such award would effectively foreclose Eastern from obtaining such a route either in a later proceeding or in a rehearing of the same proceeding after judicial review. In short, the Board's treatment of Eastern's application amounts to a denial of the hearing required by law.

A. Eastern's Application Is for the Same Route as the One Under Consideration in Docket 2196.

Eastern's application under Docket 3501 (R. 39) is for a local service route between New York/Newark and

Boston via New Haven, Hartford and Providence. Eastern seeks authority to provide such local service either (R. 40) through "amendments to its existing Routes 5 and 6, or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston, as to the Board may appear desirable in the public interest." Eastern further seeks (R. 41) "such other, further and different relief as the Board may deem appropriate."

Five applications consolidated in the proceeding under Docket 2196 are for the same route and the same type of service.

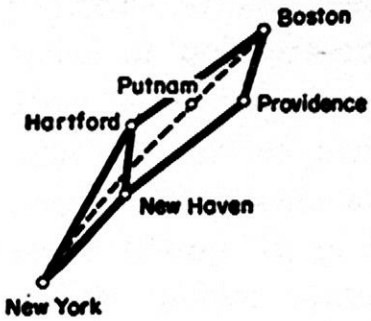
For purposes of convenient comparison, the maps opposite this page set out Eastern's application alongside each of the comparable applications consolidated in the proceeding under Docket 2196. It should be noted that some of the applicants have sought points and routes other than the ones shown on the maps. Eastern also seeks other authority through its general relief clause (R. 41). However, within each application is a route such as the one shown on the map alongside Eastern's comparable application.

Also, all comparable applications in Docket 2196 (except that of Putnam Airlines) contain broad "catch-all" clauses which amount to *exact* duplication of Eastern's application and other applications in the proceeding. For example, New England Central Airways System seeks (R. 22) "such other routes serving New England as the Board may determine that public convenience and necessity require." Northeast Airlines seeks (R. 29) "such other terminal points and such other intermediate points in the New England area as the Board may find to be points at or through which air transportation service is required by the public convenience and necessity." Island Air Ferries seeks (R. 42) "such other points, and on such other routes as the Civil Aeronautics Board may deem appro-

COMPARISON OF EASTERN AIR LINES APPLICATION UNDER DOCKET 3501 WITH APPLICATIONS CONSOLIDATED IN PROCEEDING UNDER DOCKET 2196 et al.

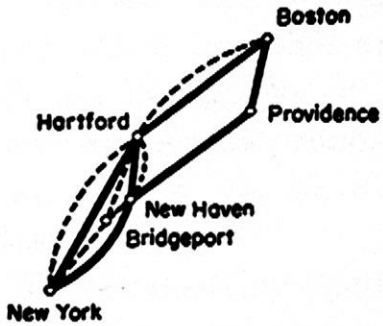
EASTERN'S DOCKET 3501

PUTNAM AIRLINES' DOCKET 2757



EASTERN'S DOCKET 3501

NORTHEAST AIRLINES' DOCKET 3182

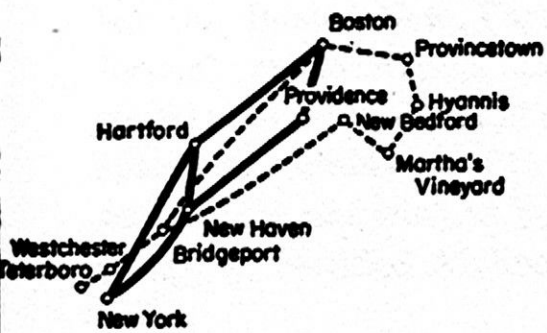


EASTERN'S DOCKET 3501

WIGGINS AIRWAYS' DOCKET 2572

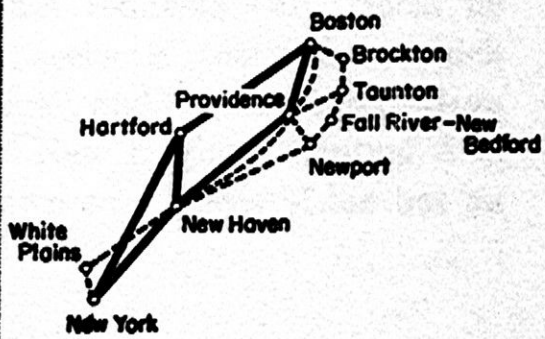
EASTERN'S DOCKET 3501

NEW ENGLAND CENTRAL'S DOCKET 2196



EASTERN'S DOCKET 3501

MASSACHUSETTS AIRLINES' DOCKET 3604



priate, specifically including those routes Northeast seeks to transfer to Wiggins; or for such other, further or different authority, certificates or relief as the Civil Aeronautics Board may deem to be in the public interest." E. W. Wiggins Airways seeks (R. 45, 48, 52) "to serve any other point or points along the routes proposed or within the New England area at which the Board may deem the type of service proposed herein to be required by the public convenience and necessity." Massachusetts Airlines seeks (Supp. B, p. 47) "such other and/or further relief as the public convenience and necessity and/or public interest shall require."

It cannot be seriously contended that Eastern's application is geographically unlike the applications consolidated in the proceeding under Docket 2196.

Nor is there any difference in the type of service offered by Eastern and by other applicants. The type of equipment which the other applicants propose to use is the same (R. 21, 24, 29, 40, 42, 46, 49, 52, Supp. B, p. 47). The other applicants propose to carry passengers, property and mail (R. 21, 23, 35, 37, 42, 44, Supp. B, p. 46), as does Eastern.

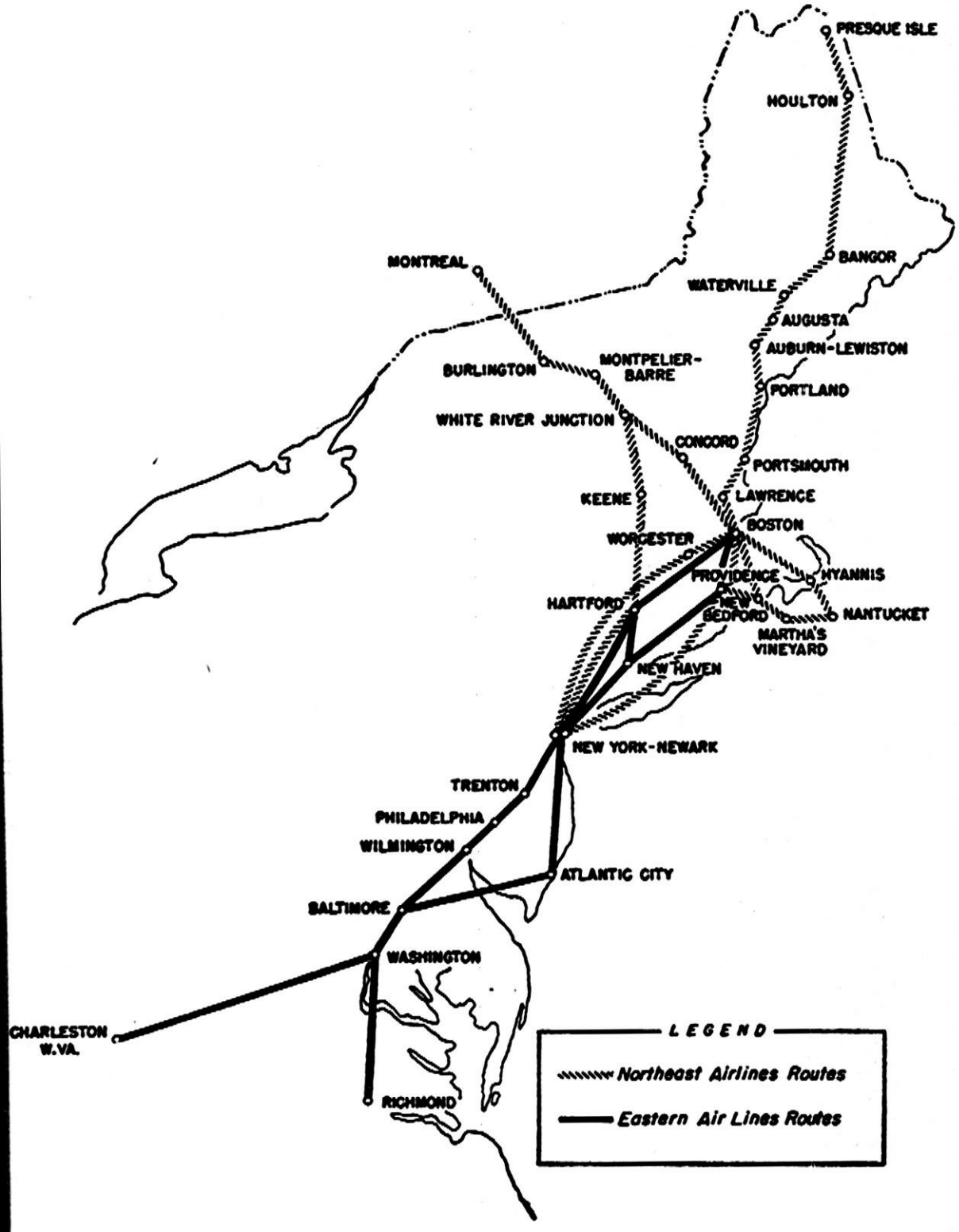
The Prehearing Conference Reports (R. 56, 81) suggest a limitation of the proceeding to "proposals for local or feeder-line service", excluding all "applications for new or additional long-haul service to and from New England." However, it is perfectly clear that the applications consolidated in the proceeding under Docket 2196 are not simply "local or feeder" proposals. Not one of the applications for the Boston-New York route requests only "local or feeder" authorization. None seeks a restriction which would prevent "long-haul service", and the *lead application* specifically states (R. 21) that New England Central Airways "does not wish to be known as a Feeder-Line but as a regular certified Airline."

At the same time, Eastern's application is not for long-haul service, but is specifically limited to either "new or separate routes" between New York/Newark and Boston ("new local service routes"—R. 72), or removal of the restrictions which prevent local service between New England points (R. 40). Eastern's application is at least as much a "local or feeder" proposal as any application for the Boston-New York route, and it is much more so than the lead application, which specifically *precludes* local-feeder service.

Moreover, the Board included within the proceeding under Docket 2196 the application of Northeast Airlines (R. 26) for a new Boston-New York/Newark route via Hartford, New Haven and Bridgeport, although Northeast is a trunkline carrier and was specifically so recognized throughout the proceeding (R. 31, 43, 57-58). In addition, the Board consolidated in the proceeding under Docket 2196 the proposal of Northeast and Wiggins (R. 31) to transfer route segments so that Northeast could "perform an exclusively regional trunk line operation" (R. 81), as well as the proposal of Northeast to abandon certain cities in order to facilitate its "trunk-line" service (R. 42). Certainly it cannot be said, in view of these facts, that trunk-line proposals were excluded from the proceeding.

If it be suggested that Eastern's application is different from the others because Eastern has existing routes south of New York which would be incidentally affected by new authorizations in New England, the answer is two-fold. In the first place, the application of Northeast Airlines for a local Boston-New York route was included, even though it would affect cities as far away as Montreal and Presque Isle, whereas the most distant points on Eastern's system which would be affected by removal of Eastern's New England restriction would be Richmond, Virginia and Charleston, West Virginia. As will be seen from the map opposite this page, the incidental effects of Eastern's pro-

TRUNKLINE ROUTES OF NORTHEAST AIRLINES AND EASTERN AIR LINES WHICH WOULD BE INDIRECTLY AFFECTED BY THEIR PROPOSED BOSTON-NEW YORK LOCAL SERVICES



posal could be no greater than the effects of Northeast's proposal insofar as long-haul service is concerned.

The second answer is that *any* Boston-New York route—even though granted to a carrier having no other route—would necessarily involve through service to points on Eastern's system south of New York, Northeast's system to Montreal, etc., and, indeed, to all points in the world where air service is available. Section 404 (a) of the Civil Aeronautics Act requires every air carrier "to provide reasonable through service in such air transportation in connection with other air carriers," and Section 1002 (i) of the Act *directs* the Board to "establish through service." Thus, an air carrier which had no route except the Boston-New York/Newark route involved in this case would be as much required to provide through service to points on Eastern's system as Eastern would be, and the Board has a *duty* under the law to require such through service. How, then, can it be said that Eastern's proposal expands the scope of the proceeding simply because Eastern has routes outside the New England area?

In this connection, it should be observed that if the Board were to exclude from each of its area proceedings every applicant whose existing routes extend beyond the area, no existing major carrier ever would receive a hearing in an area proceeding—and, for all practical purposes, no such carrier would ever receive a consolidated hearing. The Board's established policy is directly contrary to its actions in this proceeding, as will be demonstrated hereinafter, and the Board has consistently consolidated for hearing applications of existing carriers with other applications, even though there were in all cases certain long-haul implications. See the Board's statement of general policy in *Investigation of Local, Feeder, and Pick-up Air Service,* 6 C. A. B. 1, 1-2 (1944), hereinafter quoted at length.

Finally, if it be suggested that Eastern's application is different from the applications consolidated in Docket 2196 because Eastern proposes removal of restrictions on existing services, the answer is that applications in the proceeding under Docket 2196 also propose removal of restrictions. For example, see Northeast Airlines application (R. 29), and E. W. Wiggins Airways application (R. 48, 51). It should be noted that the restriction which Wiggins seeks to remove is of the same type as Eastern's as it prohibits origination or termination of schedules short of terminal points.

It follows that there is a complete identity of Eastern's application with the applications for Boston-New York authority consolidated in Docket 2196.

B. ***Hearing on Other Applications Without Concurrent Hearing on Eastern's Identical Application Would Effectively Foreclose Eastern's Right to a Hearing.***

Despite the fact that Eastern's application under Docket 3501 was filed in ample time, the Board orders of consolidation under Docket 2196 placed in the proceeding four other applications for local service between New York and Boston via intermediate points, and the Board specifically refused to consolidate Eastern's similar application, stating that Eastern's application would "unduly expand the issues and broaden the scope" of the proceeding. The Board granted an earlier request of Eastern for leave to intervene—filed before Eastern's application and solely for the purpose of defending Eastern's existing New England service from duplication as proposed by other applicants.

These two actions of the Board—granting Eastern's intervention and denying consolidation of Eastern's application—can be subject to only one reasonable interpretation (which is confirmed by the Board's past practice): Eastern will be allowed to participate in the proceeding

under Docket 2196 *only* to defend its *existing* New England service, and will not be permitted to present the merits of its application under Docket 3501 for a local service route in New England. Plainly, if this were not to be Eastern's status in the proceeding, the Board could not have contended that inclusion of Eastern's application would expand the issues and broaden the scope of the proceeding. Certainly the proceeding would not be broadened by consolidation if all the issues, arguments and data in Eastern's application under Docket 3501 could be presented fully by Eastern though limited to the role of intervener. Since denying Eastern's request for consolidation, the Board has consolidated into the proceeding under Docket 2196 one other application (Massachusetts Airlines, Docket 3604—Supp. B, p. 46) for a local route between New York and Boston via intermediate points.

Thus it appears that Eastern will be participating in the proceeding under Docket 2196 with its hands tied, forced to listen to five other applicants establish a need for a local route between New York and Boston via intermediate points, and unable to promote its own candidacy for the route. Obviously, Eastern cannot, and will not, say that there is no need for such a route. Eastern firmly believes that its proposed local New York-Boston route is needed—otherwise it would not have filed its application under Docket 3501. Because Eastern believes the route to be needed, it is forced to assume that such a route will be found to be required by public convenience and necessity in the proceeding under Docket 2196, and will be authorized. Indeed, under Section 401 (d) of the Civil Aeronautics Act, the Board *must* authorize a route if it finds (1) that the transportation proposed is required by the public convenience and necessity and (2) that the applicant is fit, willing and able to provide such transportation properly.

Very rarely has the Board found any applicant to be unfit, unwilling or unable. Never has it found five applicants in one proceeding to be disqualified. In this case, it is certain that at least one of the applicants for the New York-Boston route will be found to be qualified to operate it. Two of such applicants (Northeast Airlines and E. W. Wiggins Airways) are presently certified carriers, whom the Board has previously found to be fit, willing and able. The Board has *never* found a certificated carrier to be disqualified to conduct a new operation.

Thus, Eastern will be a bound and gagged spectator at a proceeding in which it is practically certain that the Board will award to some other applicant a route for which Eastern has filed a timely application.

If it be suggested that the Board may later grant Eastern's application also, the answer is obvious. The Board put a restriction on Eastern's New York-Boston route to protect *two* local operators. *Additional Service to Boston*, 4 C. A. B. 686, 695 (1944); *New England* case, 7 C. A. B. 27, 36, 439, 441 (1946). The Board has refused to remove that restriction. *Middle Atlantic States* case, Docket 674 *et al.*, decided Feb. 19, 1948, pp. 53-54. (The Board's motion to dismiss (pp. 3-4, 11) seeks to give the impression that the Board has refused four or five times to remove the restriction. That is an exaggeration, as the matter has been presented in only two cases since the original certification, and the evidence in those cases was necessarily prepared at such an early date that it reflected virtually no operating experience on the New York-Boston route, whereas ample evidence of the need for Eastern's unrestricted service is now available and will be presented by Eastern in the hearing on its application under Docket 3501.) The Board's previous attitude in insisting upon the restriction against Eastern's proposed local New England service is convincing that no more than one local New York-Boston route will be authorized in the

proceeding under Docket 2196 or any proceeding in the foreseeable future.

In all new route proceedings before the Board, the effect of a proposed service on "the operations of existing carriers" is one of the major obstacles to certification. *Mid-Continent Air., Twin Cities-St. Louis Operation,* 2 C. A. B. 63, 66 (1940). Here, the history of Eastern's restriction demonstrates beyond question that certification of another Boston-New York service would constitute an insuperable barrier to Eastern's proposal.

It may be noted that the Board has made no finding that Eastern's application under Docket 3501 would not be prejudiced by the Board's failure to consolidate it in the proceeding under Docket 2196. The absence of such a finding is in marked and significant contrast with the finding which the Board made in the *"TWA Route Consolidation* case, Docket 2581 *et al.",* in its Order Serial No. E-2231, November 24, 1948 (one week after one of the Board's orders involved in this appeal and three weeks before the other order here involved). There the Board found "That denial of Eastern's request to consolidate its application in Docket No. 3292 in the above-entitled proceeding will not prejudice such application." It is submitted that the Board could make no such finding in this case or it would have done so.

Hence, for all practical purposes, this is the last proceeding in which Eastern can hope to obtain the local New York-Boston route which it seeks—and the Board has excluded Eastern from the proceeding except as an intervener, permitted to present only evidence defending its existing services.

The close analogy between this case and *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327 (1945) is apparent. There the Court held that the action of the Commission in granting one of

two mutually exclusive applications without a hearing in which the merits of the second application could be presented amounted to denial of a hearing on the second application. That conclusion was reached by the Court despite the fact that the Commission had broad power to revoke the grant and substitute the second applicant in a later proceeding. The Court said that the second applicant should not be required to resort to a hearing on its application in which it was in effect seeking reconsideration of the initial grant to its competitor.

The instant case is even stronger than the *Ashbacker* case. The Board has no comparable power to revoke a certificate and substitute a later applicant. And, as demonstrated above, there is no practical possibility that the Board would grant one of the five applications in Docket 2196 and then later grant Eastern's application as well.

To suggest that under such circumstances Eastern's application would receive the same fair consideration in a later proceeding which Eastern could expect upon consolidation of its application in Docket 2196 at this time would be simply to ignore practicalities. As the Supreme Court said in the *Ashbacker* case (326 U. S. 332): "By the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee." Here, the Board has no power to "displace an established licensee".

The Supreme Court stated further in the *Ashbacker* case (326 U. S. 334): "While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application." This reasoning of the Court is based on the theory (326 U. S. 331) that the effect of the previous grant was to make

Ashbacker's "hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application." With respect to that situation, the Court said (326 U. S. 331): "That may satisfy the strict letter of the law but certainly not its spirit or intent".

This Court's recent decision in *Mansfield Journal Co.* v. *Federal Communications Commission,* No. 9817, decided March 7, 1949, throws interesting light on the question here presented. In that case the Commission had consolidated for hearing three applications for FM radio stations in Mansfield, Ohio at a time when it appeared that only two such stations could be authorized. However, the Commission later found that three stations would be authorized, and therefore severed the applications and granted one of them, assigning the other two applications for separate hearing. With respect to the latter applications, the Court said (pp. 2-3):

> "The appellant applied, not for any specific channel, but for any channel which the Commission might assign to it. It appears there was no appreciable difference in the value and usefulness of the three available channels, so the assignment of one to Richland, Inc., *did not in the slightest diminish the appellant's chance of success in obtaining a construction permit.* In that respect, therefore, the order assigning a channel to Richland, Inc., did not aggrieve the appellant nor adversely affect its interests" (Italics supplied).

Implicit in the Court's statement is the principle that, if the granting of one application *had* diminished the "chance of success" of the other applicants, the Commission's action in denying consolidation would have been reversible error. That is precisely the situation here presented.*

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* The significance of the *Mansfield Journal Co.* case with respect to the timeliness of Eastern's petition for judicial review will be discussed later herein.

II.

Eastern's Right to Consolidated Hearing Is Established by the Board's Published Rules of Procedure, Which Are Binding on the Board.

The Administrative Procedure Act requires every agency to publish a description of its organization, delegations of authority, "statements of the general course and method by which its functions are channelled and determined, including the nature and requirements of all formal and informal procedures available," and "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public." Section 3 (a) of that Act further provides that no person shall be required "to resort to organization or procedure not so published." Pursuant to such legal requirements, the Board has adopted and published its Organizational Regulations (12 F. R. 7995), Section 302.7 (b)(2) of which provides in part as follows:

> "In proceedings upon applications by air carriers for new routes, it is customary to assign all pending applications for a similar service in the same general area for conference at one time."

While, in its immediate setting, this regulation might appear to relate only to the prehearing conference stage of a proceeding, such an interpretation would be unsound and unreasonable, and, taken in the light of recent declarations of policy by the Board, the fair intent of the regulation is that "all pending applications for a similar service in the same general area" will be assigned for hearing at one time unless, of course, some of the applicants con-

sent to have their applications deferred for another proceeding.

In *Investigation of Local, Feeder and Pick-Up Air Service,* 6 C. A. B. 1, 1-2 (1944), the Board announced the following policy with respect to consolidation of applications for hearing and decision:

> "Inasmuch as the Board has since adopted the general practice of hearing in a consolidated proceeding all applications proposing service in the same general area, it does not appear necessary to consider further the population limitation proposed by the examiners. A consolidated proceeding affords full opportunity to consider the character of services proposed by the various applicants and the relationship of the type of each service to the air transportation needs of the individual cities or towns. If a need for long-haul or through service is apparent, this need can be provided for by designating the city as a stop on one or more existing routes. At the same time the need for service of a local character can be weighed in conjunction with local service proposals."

The Board's established procedure, as reflected in its Regulations and in the above quotation, has been followed in many instances which could be cited. In fact, it is believed that, prior to the orders here complained of, the Board has never refused to consolidate a geographically appropriate application of anyone other than Eastern into an area proceeding. It is submitted that the Board should be required to follow the rules and practice which it has published and on which parties have justifiably come to rely.

Administrative rules and regulations laid down by the Board pursuant to the Act have the force of law and are binding on the Board as well as the general public. Administrative Procedure Act, Section 3 (a); *Bridges* v. *Nixon,* 326 U. S. 135, 153 (1945); *United States* v. *Perkins,*

79 F. (2d) 533 (C. C. A. 2d, 1935); *United States* v. *Dunton*, 288 Fed. 959 (S. D. N. Y. 1923); *Sibray* v. *United States*, 282 Fed. 795 (C. C. A. 3d, 1922); *Ex Parte Radivoeff*, 278 Fed. 227 (D. Mont. 1922).

The Board's rules and regulations and its established and published practice, requiring consolidation of Eastern's application into the proceeding under Docket 2196, have the force of law, and the Board must adhere thereto. Hence, Eastern has a clear statutory right to participate as applicant in the proceeding.

III.

Denial of Consolidation Would Deprive Eastern of the Speedy Hearing Guaranteed by the Civil Aeronautics Act.

Section 401 (c) of the Act requires that the Board dispose of Eastern's application under Docket 3501 "as speedily as possible." The proceeding under Docket 2196 is the first proceeding in which Eastern's application could be considered and decided. It is clear that if Eastern's application is not disposed of in the proceeding under Docket 2196, it will not be disposed of for several years. It has been demonstrated hereinabove that Eastern's application is within the scope of the proceeding under Docket 2196, and it is therefore apparent that it could be decided at the same time as the other similar applications in that proceeding.

It follows that the failure of the Board to consolidate Eastern's application in the proceeding under Docket 2196 is a departure from its statutory duty to decide Eastern's application "as speedily as possible."

A correlative duty of the Board is set out in Section 1001 of the Civil Aeronautics Act as follows: "The Au-

thority may conduct its proceedings in such a manner as will be conducive to the proper dispatch of business and to the ends of justice." Proper dispatch of business requires that Eastern's application be decided together with other applications for the same route. Unless concurrent hearing is granted, the Board will be confronted with the necessity for hearing substantially the same evidence in two different proceedings. In the proceeding under Docket 2196 evidence designed to establish the public need for the Boston-New York/Newark local service route will be presented to the Board. If Eastern's application is deferred to a later proceeding, precisely the same type of evidence must be presented again at that hearing together, of course, with such evidence peculiar to Eastern's own situation as may be necessary or desirable. "Public convenience and necessity" material establishing the basic need of a route frequently is most voluminous. How could it be said to be "proper dispatch of business" to require that a great mass of such evidence be presented twice?

Likewise, "the ends of justice" can be served only by giving Eastern a hearing at the same time as other applicants for the same authority. Plainly Congress did not intend that the Board should have arbitrary power to grant preferences as to hearing to some applicants, and thereby effectively prevent other applicants from receiving a fair hearing on their applications for the same authority. Any such power in the Board would be contrary to the entire spirit of the Civil Aeronautics Act and the principles of due process.

The strongest authoritative statement which has been made with respect to the power of an agency to determine the order in which applications are to be heard is contained in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). There the Court said that "the subordinate questions of proce-

dure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." It should be emphasized that the agency's power is subject to the principles of due process, which the Court found in the subsequent *Ashbacker* case to require concurrent hearing of applications for the same authority. It might further be noted that it was the *grant* of concurrent hearing which was held to be within the Commission's power in the *Pottsville* case, not the denial of consolidation, and the Court found such power of consolidation to be supported by the necessity for giving effect to "comparative considerations" (309 U. S. 138, footnote 2). In order for the Board to give effect to "comparative considerations" with respect to the Boston-New York/Newark route, a similar consolidation of Eastern's application with the comparable applications is necessary.

The statutory requirements of speedy hearing, proper dispatch of business and justice to the parties, all establish Eastern's right to consolidation of its application for hearing with the similar applications in Docket 2196.

IV.

The Board's Statutory Duties in Furtherance of the Public Interest Require Concurrent Consideration of All Applications for the Same Service.

The public policy of the Civil Aeronautics Act has been set forth under Section 2 of the Act as follows:

> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> "(e) The regulation of air commerce in such manner as to best promote its development and safety; and
>
> "(f) The encouragement and development of civil aeronautics."

Plainly the Board cannot determine what air transportation system, as applied to the New England area, is "properly adapted" to the public needs, what is "sound," what is "adequate," what is "necessary to assure the sound development" of a national air transportation system, or what is "best" to promote commerce unless it compares Eastern's proposal with other available proposals to provide the same type of service in the same area, and leaves itself in a position to grant the one best suited to the national objectives as stated in Section 2 of the Act.

The Board has repeatedly announced that "the comparative public interest" must prevail in the selection of the carrier to operate a particular service. *North Atlantic Route* case, 6 C. A. B. 319, 339 (1946); *The Florida* case, 6 C. A. B. 765, 772 (1946); *Additional Service to Latin America,* 6 C. A. B. 857, 904 (1946); *West Coast* case, 6 C. A. B. 916, 996, 997 (1946); *American Overseas Airlines, Inc., South Atlantic Routes,* 7 C. A. B. 285, 307 (1946). The Board cannot properly determine the essential elements of "comparative public interest" in this proceeding if it declines to consolidate Eastern's application so that it will be able to compare Eastern's proposal with the similar proposals of other carriers.

While Eastern has been granted the right to intervene in the proceeding, such right of intervention offers Eastern no right to present positive evidence, data, and argument in favor of its proposal for a new route in the area but restricts Eastern to negative testimony against the granting of pending applications. This must be true, since, as noted above, the Board can hardly be expected to take the contradictory position that as an intervener Eastern will have the opportunity of presenting all evidence on its application, when the Board denied Eastern's motion for consolidation on the grounds that consideration of Eastern's proposal would over-expand the proceeding.

V.

The Board's Orders Denying Consolidation Are Not Supported by Findings as Required by Law.

The only finding which the Board made in denying the motions for consolidation filed by Eastern and by the State of Rhode Island was that "consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the scope of the above-entitled proceeding." It seems clear that such finding is not a sufficient compliance with the requirements of law. Section 1005 (f) of the Civil Aeronautics Act requires that every order of the Board "shall set forth the findings of fact upon which it is based." The Board's finding in the orders here involved is not an adequate "finding of fact", but is merely a statement of a conclusion. The insufficiency of such a finding is clearly established by the decision of this Court in *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 68 App. D. C. 282, 96 F. (2d) 554, 561 (1938), where the Court made the following statement: "These decisions show that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow. Such findings are, we think, just as necessary in cases involving the application of the statutory criterion of public convenience, interest or necessity set up by the Communications Act, as in those cases which under the Interstate Commerce Act require the application of the standard of unjust discrimination, or in those cases which under state public utility statutes require the application of the criterion of public convenience and necessity."

Section 6 (d) of the Administrative Procedure Act provides as follows:

> "(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

It seems clear that the Board's finding in connection with these orders is not "self-explanatory," and does not comply with the requirements of the Administrative Procedure Act. It should be observed that the motions for consolidation (R. 71, 89) set out very specific reasons why the application of Eastern should be consolidated in the proceeding under Docket 2195. The Board's orders brush off all such reasons with a mere statement of conclusion which throws no light whatever on the Board's reasons for refusing consolidation. Under the Civil Aeronautics Act and the Administrative Procedure Act, Eastern and the State of Rhode Island are entitled to a statement of the Board's reasons for rejecting the sound arguments presented in the motions.

VI.

Eastern Is Entitled to Judicial Review Now, and Should Not Be Required to Wait Until Its Application Has Been Prejudiced by Delay and the Grant of Other Applications.

The Board has filed a motion to dismiss this appeal on the asserted ground that the Board's orders denying consolidation of Eastern's application under Docket 3501 with the proceeding under Docket 2196 are "interlocutory" and therefore not reviewable at this time. Eastern has filed an extensive answer to that motion. Hence, it is not necessary to encumber this brief with a detailed analysis of the question of jurisdiction. However, a brief summary of Eastern's position on this question may be appropriate.

The Board's orders denying consolidation are not interlocutory, but final, in that they deny Eastern a *right* to participate in Docket 2196 as an applicant. The *right* to consolidation stems from the facts, outlined hereinabove, that (1) denial of such consolidation would effectively deny Eastern a hearing on its application; (2) the Board's rules of practice, which are binding on the Board, require such consolidation; (3) the statutory requirement of speedy hearing necessitates such consolidation; and (4) performance of the Board's duties in furtherance of the public interest requires such consolidation.

Eastern's answer to the motion to dismiss cites many authorities which establish that one who is denied a *right* to participate in a proceeding is entitled to immediate judicial review. *E.g. Gaines* v. *Clark,* 51 App. D. C. 71, 275 Fed. 1017 (1921); *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio Railroad,* 331 U. S. 519 (1947). While those cases dealt with a right of participation which was

designated "intervention", it is clear that the basic right is the one here contended for by Eastern—the right to present its own claim to the subject matter of the proceeding. The cases dealing with "intervention" make it clear that, where one has or claims an adversary interest in the subject matter, he is entitled to become a full party and have his claim fully *presented and determined.*

The *Ashbacker* case, *supra,* applies the same prinicple to an administrative proceeding, holding that one denied the right to have his application for a single available license heard with a rival application for the same license is entitled to judicial relief. It is true that in that case one application had been granted before judicial review was sought, but that was because, under the peculiar practice of the Federal Communications Commission at that time, the Commission had granted the first application without hearing and Ashbacker had therefore not previously sought the right to participate. However, the Court made it clear that such practice was improper, holding (326 U. S. 332) that the grant of the first application placed a "greater burden" on Ashbacker "than if its hearing had been earlier," and (326 U. S. 331) that the Commission could not lawfully force Ashbacker to try its application in a proceeding which amounted to "a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application".

It may be noted in passing that the *Ashbacker* decision apparently caused the Commission to revise its practice, for this Court's opinion (p. 1) in the *Mansfield Journal Company* case, *supra,* indicates that where there are three applicants for two available licenses, the Commission has a "usual procedure of consolidating the cases for hearing so that from the consideration of a single record made by three adversaries it could compare their qualifications and reach a decision as to issuing the permits sought."

What the Court held unlawful in the *Ashbacker* case is precisely what the Board by its actions here under review and its motion to dismiss is trying to compel Eastern to submit to. The Board seems to suggest that Eastern must wait until the Board has granted the Boston-New York local route to another applicant and then seek judicial relief, and, if successful in obtaining a remand of the case, try its application in a proceeding which, in effect, would be a "rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application." Eastern cannot properly be subjected to that "greater burden".

The onerous nature of the "greater burden" discussed in the *Ashbacker* case is particularly apparent in this case. The Board has no broad power, comparable with the power of the Federal Communications Commission, to revoke a certificate previously granted. The Board has power to revoke only for "intentional failure to comply" with the law or the terms of the certificate. Civil Aeronautics Act, Section 401 (h). Hence, on a "rehearing" the Board might well be prevented from giving any relief. Assuming, however, that the Court's remand of the case, after the grant of an application in the proceeding under Docket 2196, would set aside the certificate and would order the Board to reconsider the entire matter in the light of full evidence concerning Eastern's application, it still is apparent that Eastern would be gravely prejudiced, as was Ashbacker.

Although there have been many petitions for reconsideration filed with the Board, and although the Board has on many occasions granted reconsideration, the Board has *never* withdrawn an authorization previously granted. The Board has recently indicated "grave doubt" as to its legal power to withdraw such an authorization. *Kansas City-Memphis-Florida* case, Docket 1051 *et al.*, July 23, 1948.

As the Court said in the *Ashbacker* case (326 U. S. 332): "Legal theory is one thing. But the practicalities are different." Obviously, having granted a certificate to one applicant in Docket 2196, and having thereby encouraged the successful applicant to make substantial expenditures and even commence operations, the Board would be most reluctant to substitute Eastern for such applicant after the many months which would be required for judicial review, rehearings before the Board, etc.—even if the Board felt it had legal power to make such a substitution. The "burden" imposed on Eastern by such a delay in judicial review obviously would be greater than that imposed on Ashbacker. Hence, *a fortiori* Eastern is entitled to judicial review now.

It may be suggested that the Board might deny all applications in the proceeding under Docket 2196, and that therefore Eastern should wait until final decision before seeking review. As demonstrated above, such an outcome is not to be expected. In any case, Eastern would thus be denied the speedy hearing guaranteed by law. Moreover, the mere *possibility* that no harm will result to Eastern does not deprive Eastern of its right to prompt judicial relief. *Levers* v. *Anderson,* 326 U. S. 219 (1945).

It has never been seriously suggested that the mere possibility that all other claims to the subject matter of a judicial proceeding might be denied would constitute a reason for denying participation in the proceeding by one claiming an interest in that subject matter. Likewise, it has never been suggested that one claiming such an interest cannot obtain immediate judicial review of an order excluding him from the case simply because the outcome of the principal proceeding might be a rejection of all other claims to the property in question (See cases cited in Eastern's Answer to Motion to Dismiss, pp. 9-13).

Eastern cannot properly be required to risk the grave prejudice to its application which would result from the granting of other applications for the same route, merely on the chance, which is most remote, that the Board would deny all other applications.

The final answer to the argument of the Board is that this Court rejected it in *Pacific Overseas Airlines* v. *Civil Aeronautics Board*, 161 F. (2d) 633 (App. D. C. 1946). In that case the Board had refused to consolidate in a pending proceeding a late-filed application for the single route under consideration. On petition for review brought by the excluded applicant, the Board vigorously contended that the appeal was premature, on the ground that the Board's order was merely "interlocutory". However, the Court took jurisdiction, and remanded the case to the Board for further proceedings. If there were any merit in the Board's argument that an excluded applicant must wait until a competitor's application is granted before seeking review, this Court would not have assumed jurisdiction in the *Pacific Overseas Airlines* case.

The Board has filed a reply to Eastern's answer to the motion to dismiss, and relies heavily on this Court's decision in the *Mansfield Journal Company* case, *supra*. That decision clearly does not support the position of the Board with respect to the timeliness of the petition for review herein. It appears from the decision in that case that *all three* applicants could receive the authority which they were seeking, and that the prior grant of one application would "not in the slightest diminish" the "chance of success" of the others. In view of those facts, it might well be concluded that the Commission's failure to consolidate all three applications in one proceeding was "interlocutory" in the sense that it was "discretionary" and did not deny any rights. However, it appears from the Court's opinion that the decision in all likelihood would have been different

had the applications been mutually exclusive, as they are in this case, and if the Commission had refused to follow its "usual procedure of consolidating the cases for hearing so that from the consideration of a single record made by the three adversaries it could compare their qualifications and reach a decision as to issuing the permits sought."

It should be emphasized that judicial review at this time will not result in delay, but rather will expedite the entire matter. If judicial review were to be postponed until after the Board's final decision in the proceeding under Docket 2196, the entire matter would then have to be reopened several months later upon remand by this Court, a new prehearing conference would have to be held, new exhibits filed, a new hearing held, with the submission of substantial testimony, further briefs, a second examiner's report, a second argument before the Board, and a second Board decision, and the result would be that the final determination of the case would be postponed many months beyond the time required if the relief which Eastern seeks is granted at this time.

CONCLUSION

In conclusion, therefore, it is respectfully submitted that the Board's orders discussed herein should be set aside to the extent that they deny the motions of Eastern and the State of Rhode Island for consolidation for hearing and decision in the proceeding under Docket 2196 of

Eastern's application under Docket 3501; and that the motion to dismiss should be overruled.

E. Smythe Gambrell,
W. Glen Harlan,
Harold L. Russell,
825 Citizens & Southern
Bank Building,
Atlanta, Georgia.

Llewellyn C. Thomas,
Hibbs Building,
Washington, D. C.,

Attorneys for Eastern Air Lines, Inc.

Gambrell, Harlan & Barwick,
825 Citizens & Southern Bank Bldg.,
Atlanta 3, Georgia,
Of Counsel.

April 6, 1949

Certificate of Service

I hereby certify that on the 6th day of April, 1949, I have mailed copies of the foregoing brief, postage prepaid, to Edward Dumbauld and William D. McFarlane, Special Assistants to the Attorney General, Department of Justice, Washington, D. C., Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington, D. C., and Philip Schleit, Attorney for State of Rhode Island, 1346 Connecticut Ave. N. W., Washington, D. C.

Llewellyn C. Thomas

SUPPLEMENT A

STATUTES INVOLVED

CIVIL AERONAUTICS ACT (49 U. S. C. 401 *et seq.*)

Sec. 2

In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Sec. 205

(a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

Sec. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memo-

randum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

* * * * *

(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an

order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Sec. 404 (a)

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; * * *

Sec. 1001

The Authority may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. * * *

Sec. 1002

(i) The Authority shall, whenever required by the public convenience and necessity, after notice and hearing, upon complaint or upon its own initiative, establish through service and joint rates, fares, or charges (or the maxima or minima, or the maxima and minima thereof) for interstate or overseas air transportation, * * *

Sec. 1005 (f)

Every order of the Authority shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

Sec. 1006 (a)

Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

ADMINISTRATIVE PROCEDURE ACT, 5 U. S. C. 1001 *et seq.*

Sec. 3 (a)

RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations

formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Sec. 6 (d)

DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

Sec. 10

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for

which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

SUPPLEMENT B

RELATED MATTERS OCCURRING IN THE PROCEEDING UNDER DOCKET 2196 SINCE THE BOARD'S ORDERS DENYING CONSOLIDATION OF EASTERN'S APPLICATION UNDER DOCKET 3501

Extracts from Application of Massachusetts Airlines, Docket 3604, filed January 3, 1949

III

Applicant requests authority, under a permanent or temporary certificate of public convenience and necessity, to engage in scheduled air transportation of persons, property and mail as follows:

1. Between the terminal point New York, N. Y., the intermediate points White Plains, N. Y., New London, Conn., Westerly, R. I. and Newport, R. I. and (a) beyond Newport, R. I., the intermediate points Providence, R. I., Fall River, Mass. and New Bedford, Mass., and (b) beyond Newport, R. I., the intermediate point New Bedford, Mass., and (i) beyond New Bedford, Mass., the intermediate points Oak Bluffs, Mass., Nantucket, Mass., Hyannis, Mass. and Provincetown, Mass. and the terminal point Boston, Mass. and (ii) beyond New Bedford, Mass., the intermediate point Brockton, Mass. and the terminal point Boston, Mass.

2. Between the terminal point Boston, Mass. the intermediate points Brockton, Mass., Providence, R. I., Hartford, Conn., Springfield, Mass. and Pittsfield, Mass. and the terminal point Albany, N. Y.

3. Between the terminal point Boston, Mass., the intermediate points Worcester, Mass., Springfield, Mass. and Pittsfield, Mass. and the terminal point Albany, N. Y.

IV

Applicant also requests authorization to engage in air transportation over the route segments presently authorized in the certificate of public convenience and necessity issued to E. W. Wiggins Airways, Inc., or such portion of such route segments as the Board may determine to be required by the public convenience and necessity.

* * * * *

VI

Applicant presently owns fifteen (15) aircraft and owns and operates a complete terminal with all necessary ground facilities at its principal office at New Bedford, Mass. Applicant proposes to use the most modern aircraft suitable for the proposed service.

* * * * *

X

Applicant further requests that the Board grant to it the authority to serve such other intermediate or terminal points, and such other combinations of cities or routes in the area covered by this Application or in the area covered by any proceeding in which this Application may be considered, as the Board may deem to be in accord with the public interest and/or public convenience and necessity.

WHEREFORE, Applicant respectfully requests that the Board grant, in whole or in part, the authority requested herein and such other and/or further relief as the public convenience and necessity and/or public interest shall require.

Extracts from Application of Yankee Skylines, Inc., Docket 3584, filed December 9, 1948

4. Applicant hereby applies under section 401 of the Act and such other sections thereof as may be applicable for a permanent or temporary certificate of public convenience and necessity authorizing applicant to engage in the scheduled air transportation of persons, property and mail over the following system of routes:

a. Between the co-terminal points of Malone, N. Y. and Saranac Lake, N. Y., the intermediate points Plattsburgh, N. Y.; Burlington, Vt.; Rutland, Vt.; and the terminal point Boston, Mass. (hereinafter called "segment 1" of the system)

b. Between the co-terminal points Newport, Vt. and Berlin, N. H., and intermediate points Montpelier-Barre, Vt.; Lebanon, N. H.; Rutland Vt.; and the co-terminal points New York, N. Y., Newark, N. J., Teterboro, N. J., and with Westchester County Airport as an alternate terminal. (hereinafter called "segment 2" of the system)

c. Between the terminal point Portland, Me., the intermediate points Laconia, N. H.; Concord, N. H.; Claremont, N. H.; Rutland Vt.; and the terminal point Syracuse, N. Y. (hereinafter called "segment 3" of the system)

d. With the right and authority (1) to begin or terminate, or begin and terminate, trips at points short of the terminal points, and (2) to schedule service to any, or any combination of, intermediate points on any particular flight or flights, as may be or become consistent with the economic principles upon which applicant's concept is founded.

* * * * *

7. Applicant's proposed system IS NOT a feeder-line operation; it is an INTEGRATED REGIONAL SYSTEM of air routes. It integrates 3 accumulation and distribution segments, averaging approximately 50 miles between stops, with 3 non-stop runs, of approximately 125 miles, 195 miles and 168 miles respectively, for the traffic accumulated from and to the preceding segments. It is submitted as a concept which provides an effective and economically operable solution of the needs of the northern New England and New York State region.

Board Order Serial No. E-2451, February 10, 1949, in Docket 2196 et al.

ORDER GRANTING AND DENYING CONSOLIDATION AND DENYING PETITIONS.

Yankee Skylines, Inc. (Skylines), having filed with the Board on December 9, 1948, an application, Docket No. 3584, for authority to engage in air transportation in the New England area and having requested that said application be consolidated into the above-entitled proceeding;

Skylines having also filed a petition on December 9, 1948, appended to the aforementioned application in Docket No. 3584, requesting that the Board waive public hearing, and grant a temporary certificate of public convenience and necessity authorizing Skylines to engage in air transportation in the New England area;

E. Anthony & Sons, Inc., d/b/a Massachusetts Airlines (Massachusetts), having filed with the Board on January 3, 1949, an application, Docket No. 3604, for authority to engage in air transportation in the New England area and having filed with the Board on January 5, 1949, a motion requesting that said application be consolidated into the above-entitled proceeding;

The Board by Order Serial No. E-1048, issued December 10, 1947, having consolidated in the above-entitled proceeding the application of Northeast Airlines, Inc. (Northeast), in Docket No. 3182, but having severed from said application that portion thereof requesting extension of segment 5 (New York-White River Junction) of route No. 27 of said carrier to the new terminal point, Burlington, Vt., and the removal of certain restrictions;

Northeast having filed objections to the consolidation of Skylines' aforementioned application in the above-entitled proceeding unless the aforementioned severed portion of Northeast's application was also consolidated;

Colonial Airlines, Inc. (Colonial) having filed with the Board on December 27, 1948, a petition requesting reconsideration of Order Serial No. E-2201, dated November 17, 1948, denying Colonial's request for leave to intervene in the above-entitled proceeding; and Colonial having represented in said petition that Skylines' application in Docket No. 3584 proposes service which would duplicate much of Colonial's present route system and that consolidation of said application into the above-entitled proceeding would require that Colonial be authorized to intervene therein;

The Board, upon consideration of the aforesaid applications, petitions, and motion, finding:

1. That Massachusetts' application in Docket No. 3604 proposes local or feeder service entirely within the geographical scope of the above-entitled proceeding and that said applications can be expeditiously and advantageously determined in the above-entitled proceeding;

2. That Skylines' application in Docket No. 3584 does not propose local or feeder service and requests authority to serve a point beyond the geographical scope of the above-

entitled proceeding; and that consolidation of said application therein would unduly broaden said proceeding and unduly delay final disposition thereof;

3. That the Board is without power to grant the aforementioned petition of Skylines' requesting waiver of hearing and the issuance of a temporary certificate of public convenience and necessity; and

4. That in view of action hereinafter taken with respect to Skylines' application in Docket No. 3584, the matters set forth in the aforementioned petition of Colonial do not warrant granting the relief requested;

IT IS ORDERED:

1. That Massachusetts' application in Docket No. 3604 be and hereby is consolidated into the above-entitled proceeding;

2. That the request of Skylines for consolidation into the above-entitled proceeding of its application in Docket No. 3584 be and hereby is denied;

3. That the aforementioned petition of Skylines be and hereby is denied;

4. That the aforementioned petition of Colonial be and hereby is denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan
Secretary

(SEAL)

Notice of Hearing in Docket 2196 et al., February 16, 1949

Notice is hereby given pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 401 and 1001 of said Act, that the hearing in the above-entitled proceeding previously assigned for January 10, 1949, and later postponed, is hereby reassigned for March 28, 1949, at 10:00 a. m. (eastern standard time), in Court Room 4, Twelfth Floor, Federal Building, Devonshire Street between Milk and Water Streets, Boston, Mass., before Examiner Edward T. Stodola.

Dated at Washington, D. C., February 16, 1949.

By the Civil Aeronautics Board:

M. C. Mulligan
Secretary

(SEAL)

BRIEF FOR RESPONDENT CIVIL AERONAUTICS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
JUN 24 1947
Joseph W. Stewart
CLERK

No. 10099

EASTERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF CIVIL AERONAUTICS BOARD

EDWARD DUMBAULD,
WILLIAM D. McFARLANE,
Special Assistants to the Attorney General, Department of Justice, Washington, D. C.
EMORY T. NUNNELEY, JR.,
General Counsel, Civil Aeronautics Board.
HERBERT BERGSON,
Assistant Attorney General.
WARREN L. SHARFMAN,
Attorney, Civil Aeronautics Board.

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United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 10099

EASTERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE[1]

Petitioner is here seeking review of two interlocutory, procedural orders of the Board denying motions of Eastern and the State of Rhode Island, an intervener here, to consolidate for hearing and decision Eastern's application for a certificate of public convenience and necessity (Docket 3501) with the proceeding before the Board known as the

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[1] As used herein, the "Act" refers to the Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.*); "Eastern" refers to the petitioner; and the "Board" refers to the Civil Aeronautics Board. As in petitioner's brief, references to the Joint Appendix are cited as follows: (R. —).

The Act as originally enacted conferred certain functions on the "Authority". The functions of the Authority in connection with certificates of public convenience and necessity were transferred to the Board by Reorganization Plan No. IV, Sec. 7, which took effect June 30, 1940 (54 Stat. 1235, 5 F.R. 2421). Accordingly, the term "Board" should be substituted for "Authority" in all portions of the Act under consideration here.

Service In New England States Case, Docket 2196 *et al.* (R. 3). The principal issue before the Court is whether Eastern's application is so nearly the same as the applications consolidated under Docket 2196 as to make the Board's refusal to consolidate Eastern's application into that proceeding an arbitrary action which effectively deprives Eastern of a hearing on its application.

The procedural steps leading up to the issuance of the interlocutory orders in question are the following: On October 21, 1947, a prehearing conference was held before an Examiner of the Board in a proceeding tentatively designated as "*Additional Service in New England,* Docket 1279 *et al.*" Petitioner participated in this conference (R. 55, 57). The Examiner's report indicated that he would recommend to the Board that the proceeding be limited in two respects, namely: (1) on a geographical basis, to service within the New England States (R. 55), and (2) on a service basis, to local or feeder line service (R. 56). The Examiner reported further that "aside from Northeast, there was no serious objection from any of the trunk-line applicants to limit the present proceeding to applicants for new or additional local and feeder-line service" (R. 57).

Shortly thereafter the Board dismissed certain applications considered for consolidation at the prehearing conference and consolidated others into the proceeding, which was designated "*Additional Service in New England States Case,* Docket 2196 *et al.*" (R. 65-69). Among other things, the Board severed paragraph 4(c) of Northeast's application under Docket 3182 (R. 29), which sought the extension of its trunkline route from White River Junction to Burlington (R. 66), and deferred for disposition in a separate proceeding applications proposing air transportation by helicopter (R. 69). Petitioner, which had no application on file relating to this proceeding, was granted intervention (R. 66, 69).

On August 24, 1948, the Board consolidated the *Northeast-Wiggins Route Transfer Case,* Docket No. 3337, a proceeding to secure approval from the Board of the transfer by Northeast to Wiggins of many of Northeast's operating

rights with respect to local and feeder line services in New England (R. 31-39), and the *Additional Service in New England States Case,* Docket No. 2196 *et al.,* into a proceeding to be known as the *"Service in New England States Case",* and directed that a hearing be held therein (R. 70-71).

On September 17, 1948, a further prehearing conference in the *Service in New England States Case,* Docket 2196 *et al.* was held before an Examiner of the Board (R. 79), in which petitioner participated (R. 80, 84-85). The Examiner's report on the conference was issued on September 30, 1948 (R. 79-88). Like the earlier report, it was concerned substantially, although not exclusively, with the limitations on the scope of the proceeding. The report specified the "applications for new or additional local air services in the general area of New England" previously consolidated under Docket 2196, and pointed out that "applications for new or additional long-haul service to and from New England were excluded from the foregoing proceeding" (R. 81). The geographical scope of the proceeding was more specifically stated so as to include only the area north of New York City and east of such cities, as Albany, Schenectady, White Plains and similar points (R. 84). Likewise, the type of service to be encompassed within the proceeding was also carefully considered. Petitioner proposed to file an application for removal of the restrictions upon its existing operation between New York and Boston,[2] and to request that the application be considered and heard in the proceeding. Northeast and American, two competing trunk line operators between these points, objected and pointed out that a similar proposal by petitioner had recently been rejected by the Board. The Examiner indicated that he would be unable to recommend the inclusion of petitioner's proposed application in the proceeding,

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[2] As stated by petitioner (R. 4), the restriction is as follows: "The holder shall serve Boston only on flights originating or terminating south of Richmond or west of Charleston [W. Va.]; * * * the holder shall serve Providence, Hartford and New Haven only on flights originating at Boston and terminating south of Richmond or west of Charleston or on flights originating south of Richmond or west of Charleston and terminating at Boston."

expand the issues and broaden the scope of the above-entitled enlarge the scope of the proceeding" (R. 84-85). Northeast stated that it was planning to withdraw paragraph 4(a) of its application under Docket 3182, involving additional service on its existing route between New York and Boston (R. 28), but that such withdrawal was contingent upon Eastern's application being left out of the proceeding (R. 82, 85).

One week later, within the period contemplated by the Examiner's report (R. 88), petitioner filed an application (Docket 3501) requesting the Board to "remove all existing restrictions" on its services to and from Boston, Providence, Hartford and New Haven (R. 39-41), and asked that the authorizations "to perform unrestricted transportation in relation to said cities" be given either as amendments to its existing certificates or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston (R. 40). At the same time, petitioner filed a motion (R. 71-76) to consolidate its application for hearing and decision under Docket 2196.

American Airlines, Inc., an intervener in Docket 2196 (R. 66, 69), filed a motion to dismiss Eastern's motion to consolidate, pointing out that the purpose of Eastern's application "is to obtain unlimited participation in the Boston-New York and Boston-Washington markets, and that such an application has no place in a proceeding otherwise involving nothing but feeder-type services" (R. 76). It also set forth in detail the historical record of the restrictions placed on Eastern's New England service, the reasons given by the Board for their imposition, and Eastern's attempts to rid itself of them (R. 76-78).

On November 12, 1948, Rhode Island, an intervener in the proceeding under Docket 2196 (R. 66, 69), filed a "Motion for Consolidation for Hearing and Decision," similar to that previously filed by petitioner (R. 89-92).

On November 17, 1948, the Board denied petitioner's motion to consolidate its application under Docket 3501 with the proceeding under Docket 2196, finding that "consolidation of Eastern's application, Docket 3501, would unduly ex-

pand the issues and broaden the scope of the above-entitled proceeding" (R. 92-95, 94). In the same order, the Board dismissed the joint application of Northeast and Wiggins in Docket 3337 relating to the transfer of certain of Northeast's routes to Wiggins (R. 93, 95), and granted Wiggins leave to amend its application in Docket 2572 "*Provided That* said amended application shall not propose services beyond the scope of the issues in the above-entitled proceeding as defined in the prehearing conference reports served November 7, 1947 and September 30, 1948" (R. 95). This order, Serial No. E-2201, is one of the orders petitioner seeks to have reviewed in this proceeding (R. 3).

On December 21, 1948, the Board denied Rhode Island's motion for consolidation for the same reasons that it had previously denied the similar motion of petitioner (R. 96). This order, Serial No. E-2308, is the other order petitioner seeks to have reviewed in this proceeding (R. 3).

At the time petitioner's motion to consolidate was denied, six applications had been consolidated under Docket 2196.[3] Subsequently, two other applications were filed.[4] The application of Massachusetts Airlines was consolidated under Docket 2196 upon a finding that it "proposes local or feeder service entirely within the geographical scope of the * * * proceeding", while the motion to consolidate the application of Yankee Skylines, Inc. was denied on the ground that it "does not propose local or feeder service and requests authority to serve a point beyond the geographical scope of the * * * proceeding" (See Pet. Br., Sup. B, pp. 49-51, 50). The scope of each of these eight applications as compared with Eastern's is pictured on the maps in the pocket on the inside back cover of this brief.

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[3] New England Central Airways System, Inc., Docket 2196 (R. 19-23); Putnam Airlines, Docket 2757 (R. 23-25); Royal Air Lines, Docket 2925 (R. 25-26); Northeast Airlines, Inc., Docket 3182 (R. 26-30, 66, 82); E. W. Wiggins Airways, Inc., Docket 2572 (R. 44-52, 95); and Island Air Ferries, Inc., Docket 3518 (R. 41-42).

[4] Massachusetts Airlines, Docket 3604 (Pet. Br., Sup. B, pp. 46-47). Yankee Skylines, Inc., Docket 3584, (Pet. Br., Sup. B, pp. 48-49).

All of these applications are analyzed below. (*Infra,* pp. 16-21.)

Since the orders under review were entered, various procedural steps have been taken by the Board and by the parties in the proceeding under Docket 2196. Among others, the hearing in Docket 2196 was commenced on March 28, 1949, and was concluded on April 1, 1949. Such of the procedural steps as are pertinent to the issues before the Court in this proceeding will be referred to in the argument below. Where those procedural steps are evidenced by documents filed in the proceeding, they will be reproduced in a supplement to this brief. This manner of handling such materials is consistent with the approach followed by petitioner (Pet. Br. 5).

On January 14, 1949, Eastern filed a petition in this Court to review the interlocutory orders of the Board denying motions to consolidate, for hearing and decision, Eastern's application (Docket 3501) with the proceedings under Docket 2196. On March 3, 1949 the Board filed a motion to dismiss the petition on the ground that the orders for which review is sought are not final orders and that this Court, therefore, lacks jurisdiction to review them. Eastern filed an answer to this motion on March 26, 1949, and the Board a reply on April 1, 1949. On May 27, 1949, this Court denied the motion to dismiss, without prejudice.

THE STATUTES INVOLVED

In addition to the statutes set forth in Petitioner's Brief, Supplement A, pages 39 to 45, to which references have been made herein, pertinent portions of these enactments are quoted at appropriate points in this Brief.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review, at this time, the interlocutory, procedural order of the Board denying Eastern's motion to consolidate.

2. If the Court determines that it has jurisdiction to review the order, whether the Board committed reversible error in refusing to consolidate Eastern's application under

Docket 2196. This raises the following subsidiary questions:

(a) Whether Eastern's application is so nearly the same as the applications consolidated under Docket 2196 and so clearly within the scope of that proceeding as to justify the conclusion that the Board's refusal to consolidate was so unreasonable as to amount to an abuse of discretion.

(b) Whether there is any sound basis in fact, as distinguished from conjecture, for finding that the denial of consolidation will preclude Eastern from securing favorable consideration on its application, and amounts to a denial of a hearing to Eastern on its application.

(c) Whether there is anything in the Board's rules of procedure which bound it to grant Eastern consolidation notwithstanding the fact that such consolidation "would unduly expand the issues and broaden the scope" of the proceeding under Docket 2196.

(d) Whether the statutory provisions that applications be heard "as speedily as possible" and that proceedings before the Board may be conducted "in such a manner as will be conducive to the proper dispatch of business and to the ends of justice" require the consolidation of Eastern's application under Docket 2196 notwithstanding the fact that such consolidation "would unduly expand the issues and broaden the scope" of the proceedings on the other applications, requiring the other applicants before getting an initial determination on their applications to wait and attend upon the litigation of extraneous issues raised by Eastern which the Board had recently and repeatedly decided against Eastern.

(e) Whether the "public interest" requires the concurrent consideration on a comparative basis of applications for feeder line services in one area and trunk line services extending to another area.

3. Whether, in the light of the issues tendered by Eastern's motion to consolidate and American's motion to dismiss the motion to consolidate, and the other pertinent circumstances, the Board's finding that the consolidation

of Eastern's application "would unduly expand the issues and broaden the scope" of the proceedings under Docket 2196 constitutes compliance with the requirements of the Act to "set forth the findings of fact" upon which an order is based and the requirement of the Administrative Procedure Act to accompany the denial of a request "by a simple statement of procedural or other grounds", or whether the findings of the Board are deficient and require the remand of the orders to the Board with directions to make additional findings.

SUMMARY OF ARGUMENT

I

The orders for which review is sought are interlocutory, procedural orders which, under well settled principles of law, lack the finality necessary to make them reviewable at this time. This Court has no jurisdiction, therefore, to review the merits of the orders and should dismiss the petition for judicial review. Moreover, even if the Court finds that it has jurisdiction to review the Board's orders if Eastern has a "right" to consolidation, it should nevertheless dismiss the petition for review since, as we show below, Eastern has no "right" to consolidation.

II

Eastern is not entitled to the relief it seeks on the merits because it has not established that the orders of the Board refusing to consolidate its application into the proceedings under Docket 2196 are so arbitrary as to constitute an abuse of discretion. On the contrary, the Board's orders represent a reasonable exercise of its discretion in disposing of Eastern's request in the light of all the facts and circumstances, and were required for the "proper dispatch of business" and "the ends of justice." (Section 1001 of the Act).

Official pronouncements of the Board and its examiners issued prior to the denial of Eastern's motion for consolidation clearly limited the scope of the proceeding under Docket 2196 in two respects: (1) on a geographical basis,

to the New England area north of New York City and east of Albany, and (2) on a service basis, to proposals for new or additional local or feeder line services. All of the proposals consolidated under Docket 2196 either at the time Eastern's motion was denied, or presently, are within the scope of the proceeding under Docket 2196 as so limited. On the other hand, Eastern's proposal to perform "unrestricted transportation" between Boston and New York, via Providence, Hartford and New Haven, would permit it to fly from Boston to New York without limitation, and, as Eastern admits, would permit it to fly for the first time from Boston and other New England points to points as far south of New York as Richmond on an unrestricted basis. Such semi-long-haul service between major traffic generating centers performed on an unrestricted basis constitutes a trunk line service, and, in part, a trunk line service outside of the New England area. Unlike the other applications under Docket 2196, Eastern's proposal was outside the scope of such proceeding both on a service basis and on a geographical basis. Furthermore, Eastern's proposal was to duplicate the trunk line services already certificated to American or Northeast, or both of them, and had repeatedly and recently been considered by the Board in other proceedings. The Board's refusal to consolidate Eastern's application into Docket 2196 under such circumstances, upon a finding that consolidation "would unduly expand the issues and broaden the scope" of the proceeding, was clearly reasonable. Judicial intervention does not extend to such an action.

Eastern's sweeping assertions that the route it is seeking "is certain to be awarded to some applicant in the proceeding under Docket 2196" and that failure to grant it consolidation "would effectively foreclose Eastern's right to a hearing" on its application are utterly groundless. No applicant under Docket 2196 has proposed an unrestricted trunk line route between Boston and New York, via Providence, Hartford, and New Haven, or any other points, and the Board has clearly stated that it would not entertain such proposals in the proceeding under Docket

2196. To assume nonetheless that the Board will find such service is required by public convenience and necessity, that a carrier in the proceeding is "fit, willing and able" to perform such service, and that the route "is certain to be awarded" flies in the face of all reason. Since the issues in Docket 2196 are wholly different from the issues on Eastern's proposal, hearing and decision in Docket 2196, without the consolidation of Eastern's application, will in no way limit the hearing Eastern will receive on its application in its regular turn. The principle of the *Ashbacker* case is inapplicable here because the applications under Docket 2196 and Eastern's application are not "mutually exclusive."

III

The Board's rules of procedure prescribe no standard for the consolidation of cases for hearing. If the rule relating to the assignment of cases for prehearing conference were applied to hearings, as Eastern contends, it would not require consolidation because Eastern's application is not "for a similar service in the same general area" as the other applications in Docket 2196.

The provisions of the Act that applications shall be heard "as speedily as possible" and that proceedings before the Board may be conducted "in such a manner as will be conducive to the proper dispatch of business and the ends of justice" do not require a consolidation which "would unduly expand the issues and broaden the scope" of the proceeding and require other applicants before getting an initial determination on their applications to wait and attend upon the litigation of extraneous issues raised by Eastern which the Board has recently heard and decided against Eastern.

The "public interest" does not require the consolidation of Eastern's application into Docket 2196 in order to permit the Board to give concurrent consideration on a comparative basis to applications for feeder line services in one area and Eastern's proposal for trunk line services extending into another area.

IV

The Board's findings in support of its order denying consolidation concisely state the basis for its decision and, considered in the light of the other pleadings of record, clearly conform to all requirements of law. No useful purpose to this Court or to Eastern would be served by remanding the orders to the Board with directions to make further findings.

ARGUMENT

I. This Court has no jurisdiction to review, at this time, the interlocutory, procedural order of the Board denying Eastern's motion to consolidate.

The Board filed a motion to dismiss Eastern's petition for judicial review on the ground that this Court has no jurisdiction to review, except in conjunction with a final order, the interlocutory, procedural order of the Board denying Eastern's motion to consolidate. The Board's memorandum in support of the motion to dismiss set forth an abundant representation of the myriad authorities which settle the law on this point beyond question. Eastern's answer to the motion to dismiss failed to come to grips with these cases, but relied instead on a line of cases holding that the denial of a "right" to *intervention* in a *court* proceeding is appealable directly. In our reply, we pointed out the lack of applicability of such cases to the denial of *consolidation* in an *administrative* proceeding. Nevertheless, this Court denied the motion to dismiss, without prejudice to its renewal.

We again urge upon the Court the contention that it lacks jurisdiction to review, at this time, the interlocutory, procedural orders of the Board refusing to consolidate Eastern's application into Docket 2196. However, we agree with Eastern that "it is not necessary to encumber this brief with a detailed analysis of the question of jurisdiction" (Pet. Br. 31), and we respectfully refer the Court to the papers already filed on this question. Since, however, Eastern's "brief summary" of its position amounts to almost one-quarter of its argument (Pet. Br. 31, 31-36), we believe a few observations are appropriate.

Eastern's contention that the Court has jurisdiction to review, at this time, the interlocutory, procedural order of the Board denying it consolidation rests upon its assertion that it has a "right" to consolidation, and that "one who is denied a *right* to participate in a proceeding is entitled to immediate judicial review" (Pet. Br. 31). In contradistinction to this, it is the Board's position that the jurisdiction of this Court does not depend upon whether Eastern has a "right" to consolidation. Even if it be assumed, *arguendo,* that Eastern has a "right" to consolidation, this Court and other authorities have uniformly held that a judicial determination of that "right" cannot be made until there is presented to the reviewing court a *final* order in which the petitioner has a "substantial interest." *Mansfield Journal Company* v. *Federal Communications Commission,* App. D. C., No. 9817, decided March 7, 1949. There was such a final order, of course, in *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327 (1945), and the appeal was from that order (326 U. S. at p. 329). The same thing was true in *Levers* v. *Anderson,* 326 U. S. 219 (1945), cited by Eastern (Pet. Br. 34). Once this crucial distinction is recognized the whole structure of petitioner's argument falls.

While the Court handed down no opinion in denying the motion to dismiss, without prejudice to its renewal, its action may signify that the Court believes it has jurisdiction to review the Board's orders if Eastern has a "right" to consolidation. We show below (*infra,* pp. 13-33), conclusively, that Eastern has no "right" to consolidation as a matter of substance. We believe, therefore, that the Court should, upon finding that Eastern has no "right" to consolidation, dismiss the petition for review for lack of jurisdiction.

It makes no difference to the outcome of this case whether the petition is dismissed for lack of jurisdiction or denied on the merits. The importance of the jurisdictional issue lies in its effect on subsequent appeals. Unless the Court carefully marks out the limits of its jurisdiction, appro-

priate guidance will not be afforded to litigants, and the Board and the courts will be faced with repeated efforts to secure review of all kinds of interlocutory, procedural orders.

II. Eastern will not be deprived of its right to a full and fair hearing on its application because of the Board's refusal to consolidate such application with the proceedings under Docket 2196.

Eastern states, quite correctly, that it is entitled to a full and fair hearing on its application under Docket 3501 (Pet. Br. 10). It does not suggest that it will not be accorded such a hearing in due course at which it will have adequate opportunity to support its application. Rather, its position is that irrespective of any hearing it may secure at a later date, its right to a hearing on its application "would be effectively denied" if its application were not consolidated with the proceeding under Docket 2196 because the route involved in its application is the same as that involved in Docket 2196 and such route "is certain to be awarded to some applicant in the proceeding under Docket 2196" (Pet. Br. 11).

This argument rests on two assumptions: (1) that Eastern's application is the same as the applications under Docket 2196 (Pet. Br. 11-16); and (2) that Eastern will be precluded from receiving favorable consideration on its application in the absence of consolidation (Pet. Br. 16-21.) As to the first assumption, we shall demonstrate below, as a matter of fact, that Eastern's application is *not* the same as the other applications under Docket 2196 and that, as the Board found, its inclusion in the proceeding under Docket 2196 "would unduly expand the issues and broaden the scope" of such proceeding. Eastern's second assumption is based wholly on conjecture and neither Eastern, the Board, nor this Court can now show, with any degree of certainty, what action the Board will take on the various applications in the future. We can and will show, however, that Eastern's sweeping assertions that the route it is seeking "is certain to be awarded to some applicant in

the proceeding under Docket 2196" and that failure to grant it consolidation "would effectively foreclose Eastern's right to a hearing" are utterly groundless.

A. *The Board's refusal to consolidate Eastern's application with Docket 2196, based on a finding that such consolidation "would unduly expand the issues and broaden the scope" of the proceeding, is clearly reasonable because Eastern's application raises issues as to the establishment of trunk line services, in part outside the New England area, which are outside the well-defined scope of Docket 2196, rather than issues like those raised by the applications consolidated in Docket 2196 as to the need for local or feeder line services within such area.*

The starting point in the determination of the merits of Eastern's claim to a "right" to consolidation is a comparison of Eastern's application with the other applications under Docket 2196 on the basis of the standards employed by the Board and its examiners for delineating the scope of the proceedings under Docket 2196.

The orders of the Board and the examiners' reports of the prehearing conferences in Docket 2196 plainly and repeatedly indicate that the proceeding was limited in two respects, namely: (1) on a geographical basis, to service within the New England States, and (2) on a service basis, to local or feeder line service.[5]

With respect to the geographical limitation, the examiner announced at the first prehearing conference on October 21, 1947, that the proceeding would be confined "to applications seeking authority to provide new or additional service in the New England States" and that applications for "routes outside of this area would not be recommended for consolidation * * * unless the service proposed was incidental to service in New England and in a region rea-

[5] Section 302.7 (b) (5) of the Board's Organizational Regulations (12 F.R. 7995) provide that the prehearing conference report and the Board's subsequent order or notice of hearing will establish the scope of a proceeding. (*Infra*, p. 34.)

sonably adjacent to cities in the New England States" (R. 55). The examiner's report on the second prehearing conference held on September 17, 1948, reiterated this (R. 81) and indicated more specifically that the area involved was north of New York City and east of such cities as Albany, Schenectady, White Plains and similar points (R. 84). These pronouncements were approved by the Board in its order of November 17, 1948, denying Eastern consolidation (R. 95, par. 5). Later, in its order of February 10, 1949, the Board refused to consolidate the application of Yankee Skylines, Inc., which sought a route as far west as Syracuse (Pet. Br., Sup. B, p. 48), in part upon the ground that it "requests authority to serve a point beyond the geographical scope" of the proceeding (Pet. Br., Sup. B, p. 50).

As to the service limitation, the examiner's report of the first prehearing conference states (R. 56):

> "In view of the difficulties that inevitably arise in attempting to consider applications for both trunk-line service and local or feeder-line service in the same proceeding, the examiner stated at the outset that he would very likely recommend to the Board that this proceeding be limited to proposals for local or feeder-line services unless the trunk-line applicants could show that they would be adversely affected by such procedure."

The report went on to state (R. 57): "Aside from Northeast, there was no serious objection from any of the trunk-line applicants to limit the present proceeding to applicants for new or additional local or feeder-line service." Shortly thereafter the Board issued an order severing paragraph 4(c) of Northeast's application under Docket 3182, which proposed additional trunk-line service (R. 29), and consolidating certain of the applications for local or feeder line services into Docket 2196 (R. 66). The report of the second prehearing conference states that the proceeding under Docket 2196 covers "applications for new or additional local air services in the general area of New England" and that "applications for new or additional long-

haul service to and from New England were excluded from the foregoing proceeding" (R. 81). These limitations on the services to be considered in the proceeding were approved by the Board in its order of November 17, 1948, denying Eastern consolidation (R. 95, par. 5). The Board emphasized these service limitations of the proceeding, as well as the geographic limitations, in its order of February 10, 1949, by refusing to consolidate the application of Yankee Skylines, Inc., which proposed trunk line services between Rutland, Vermont and Boston, New York, and Syracuse, respectively (Pet. Br., Sup. B, p. 48), in part upon the ground that it "does not propose local or feeder service", while consolidating the application of Massachusetts Airlines (Pet. Br., Sup. B, p. 46) because, among other reasons, it "proposes local or feeder service" (Pet. Br., Sup. B, p. 50).

In the light of these limitations on the scope of the proceedings under Docket 2196, we turn to a comparison of each of the applications with the application of Eastern Airlines. Such comparisons are presented visually in the maps contained in the pocket in the inside back cover of this brief. It is suggested that the immediately following comments be read with those maps in view.

Application of Island Air Ferries, Inc., Docket 3518, (R. 41-42).—Island's application as originally filed only sought an amendment to its existing certificate to permit it to carry mail. It was previously authorized to carry persons and property from the New York City area to New London, Connecticut via seven intermediate points on Long Island, and from Islip, Long Island, to New Haven, via Bridgeport. By Amendment No. 1 to its application, dated January 20, 1949, Island asked for additional authority to serve Newark (Supp., *infra,* p. 44).

Application of Massachusetts Airlines, Docket 3604, (Pet. Br. Sup. B, pp. 46-47).—Massachusetts' application was filed on January 3, 1949. It proposed to serve three route segments, two running from Boston to Albany, one via five intermediate points and the other via three. The third segment in Massachusetts' route system runs from New

York City to Boston via either six or nine intermediate points, in either case including White Plains, New London, Westerly, R. I., Newport, R. I., and New Bedford, Mass. Eastern's map of Massachusetts' application appearing opposite page 12 of its brief does not accurately reflect the application printed on page 46 of its brief.

On February 4, 1949, Massachusetts wrote to the Board "to clarify" its application. It pointed out that its application is for "local and feeder service" and not "for trunk line service," and that it "is willing to accept any reasonable restriction * * * to prevent the Company from operating a trunk line service." (Supp., *infra*, pp. 45-46). On February 10, 1949, the Board, finding that Massachusetts' application "proposes local or feeder service", consolidated the application into the proceeding under Docket 2196 (Pet. Br., Sup. B, p. 50).

On March 15, 1949, Massachusetts filed an amendment to its application (Supp., *infra*, pp. 47-48). Certain additional intermediate points were added to its proposed system by the amendment. The New York-Boston segment has either seven or ten intermediate points under the amended proposal. Eastern's map of Massachusetts' application appearing opposite page 12 of its brief does not accurately reflect the amended proposal.

Application of New England Central Airways System, Inc., Docket 2196, (R. 19-23).—New England's original application proposed two route segments, one from Boston to Albany and the other from Boston to Bar Harbor, both via numerous intermediate small points. By amendment to its application it states that it "is willing to accept" other routes "with preference" for eight "alternative routes" which it lists. These routes would serve 36 cities and smaller centers in the States of New York, Connecticut, Rhode Island, Massachusetts, Maine, Vermont and New Hampshire. One of these routes serves the vacation area of Cape Cod and the adjacent islands, running from Boston to Teterboro, N. J. via six intermediate points. New England's application states that it "does not wish to be known as a feeder-line but as a regular certified airline."

At the hearing in Docket 2196, New England asked that its application be dismissed, and on April 18, 1949, the Board entered an order dismissing its application, (Supp., *infra*, p. 50).

Application of Northeast Airlines, Inc., Docket 3182, (R. 26-30).—By November 17, 1948, when the Board denied Eastern's motion for consolidation, the only part of Northeast's application remaining in Docket 2196 was paragraph 4 (b) (R. 28-29). This paragraph sought to add Manchester and Concord, New Hampshire, intermediate points on its Boston-White River Junction segment, as intermediate points on its New York City-Caribou, Maine segment.

It will be recalled that Northeast's proposal to extend its trunk line service from the terminal point White River Junction to the new terminal point Burlington (R. 29), was severed by the Board from Docket 2196 (R. 66). Northeast itself withdrew its proposal to add Bridgeport, New Haven, Hartford, and Springfield as intermediate points on its New York-Boston run at the second prehearing conference on condition that Eastern's application was not consolidated into Docket 2196 (R. 82, 84-85), and this proposal was in fact withdrawn (Supp. *infra*, pp. 48-50). Eastern's map of Northeast's application appearing opposite page 12 of its brief does not accurately reflect this fact.

Application of Putnam Airlines, Docket 2757, (R. 23-25).—Putnam's application, as amended to February 3, 1947, proposes to serve 12 different routes in the States of Connecticut, Rhode Island, Massachusetts, and New York. All of the routes radiate out from Putnam, Connecticut, and encompass service to 18 communities. One of the routes runs from Putnam to Boston, and another from Putnam to New York City.

On January 24, 1949, Putnam filed another amendment requesting two additional routes serving four additional communities. (Supp., *infra*, pp. 44-45).

Application of Royal Air Lines, Docket 2925, (R. 25-26).—Royal's application proposes three separate routes between Boston and Eastport, Maine, Millinocket, Maine,

and Burlington, Vermont, respectively, with five to seven intermediate points on each of the routes.

Royal did not prosecute its application at the hearing in Docket 2196, and on April 18, 1949, the Board entered an order dismissing its application (Supp., *infra*, p. 50).

Application of E. W. Wiggins Airways, Inc., Docket 2572, (R. 44-52).—At the same time that it denied Eastern's motion to consolidate, the Board, acting on Wiggins' prior request (R. 93), dismissed Amendment No. 2 to the application of Wiggins in Docket 2572 (R. 92). Since Amendment No. 2 constituted Wiggins' entire application at that time, Wiggins had no route proposals in Docket 2196 [6] when the Board acted on Eastern's motion.

In its order of dismissal the Board granted Wiggins leave to amend its application in Docket 2572 "*Provided That* said amended application shall not propose services beyond the scope of the issues in the above-entitled proceeding as defined in the prehearing conference reports served November 7, 1947 and September 30, 1948" (R. 95).

On March 10, 1949, Wiggins addressed a letter to the Board's examiner setting forth those portions of Amendment No. 1 to its application in Docket 2572 (R. 46-49) which it intended to prosecute at the hearing under Docket 2196 (Supp., *infra*, pp. 46-47). On this basis the only route extensions Wiggins is seeking are "from Providence and Willimantic to New London and New Haven." Wiggins has no proposal in Docket 2196 to fly a New York-Boston route. Eastern's map of Wiggins' application appearing opposite page 12 of its brief does not accurately reflect Wiggins' application either at the time Eastern's motion was denied, or at present.

Application of Yankee Skylines, Inc., Docket 3584, (Pet. Br., Sup. B, 48-49).—Yankee's application proposes a route system of three segments: (1) between Malone-Saranac Lake, N. Y., and Boston, via three intermediate points; (2) between Newport, Vt.-Berlin, N. H., and New York City,

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[6] The joint application of Wiggins and Northeast relating to their route transfer agreement (Docket 3337) was dismissed at the request of the parties in the same order (R. 93, 95).

via three intermediate points, but with no point between Rutland, which is on all three segments, and New York City; and (3) between Portland, Maine and Syracuse, via four intermediate points. The Board found that this application "does not propose local or feeder service and requests authority to serve a point [Syracuse] beyond the geographical scope" of Docket 2196 and denied Yankee's motion to consolidate (Pet. Br., Sup. B, pp. 49-51).

Application of Eastern Airlines, Inc., Docket 3501, (R. 39-41).—Eastern's application proposes "unrestricted transportation" between New York-Newark, New Haven, Hartford, Providence, and Boston. Since it is already authorized to serve all of these points on a restricted basis,[7] its proposal is either to remove such restrictions or to grant it a new unrestricted "local" route between such points. In either event it would be able to fly non-stop from Boston to New York without limitation, thus duplicating the services already certificated to Northeast and American. Such a service between major traffic generating centers is a trunk line service. Likewise, Eastern's proposals would permit it to fly for the first time from Boston and other New England points, to points as far south of New York as Richmond on an unrestricted basis. Thus, in its motion to consolidate Eastern stated (R. 73-74):

> "It is true that Eastern's proposal involves the question of the improvement of Eastern's service between points south of New York/Newark on the one hand (Trenton, Philadelphia, Atlantic City, Wilmington, Baltimore, Washington, Richmond and Charleston, W. Va.) and the New England points on the other."

Unrestricted service between such points is a trunk line service. Moreover, it is a service duplicating that of

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[7] The restriction is as follows: "the holder shall serve Boston on flights originating or terminating south of Richmond or west of Charleston [W. Va.]; * * * the holder shall serve Providence, Hartford and New Haven only on flights originating at Boston and terminating south of Richmond or west of Charleston or on flights originating south of Richmond or west of Charleston and terminating at Boston" (R. 4).

American (R. 76) in an area outside of the geographical scope of the proceeding under Docket 2196.

As previously indicated, the Board refused to consolidate Eastern's application into Docket 2196 on the ground that it "would expand the issues and broaden the scope" of such proceeding (R. 92-95).

Geographical comparison.—It is evident from the foregoing and the maps that not one of the applications consolidated into Docket 2196 involves new or additional service outside the geographical scope of such proceeding as defined by the prehearing conference reports and the orders of the Board (*supra*, pp. 14-16). Eastern's application, like that of Yankee Skylines, Inc., proposes new service outside the geographical scope of the proceeding under Docket 2196, as Eastern's motion to consolidate admits. Both of these applications were excluded from the proceeding. Clearly Eastern's application differs materially in this important respect from all the applications in Docket 2196, and on this basis alone the Board's refusal to consolidate Eastern's application was reasonable and "conducive to the proper dispatch of business and the ends of justice." (Section 1001 of the Act.)

Eastern argues that its application is not "geographically unlike the applications consolidated in the proceeding under Docket 2196" because some of the other applications "contain broad 'catch-all' clauses which amount to *exact* duplication of Eastern's application and other applications in the proceeding" (Pet. Br. 12-13). This argument is completely unrealistic. Cf. *State Airlines, Inc.* v. *Civil Aeronautics Board*, App. D.C., No. 9748, decided April 6, 1949. First, such an interpretation of the "catch-all" clauses would require the Board to consolidate all applications pending before it containing such broad clauses into a single proceeding. Such a preposterous result is refuted by the report of the second prehearing conference in which the examiner stated (R. 63): "All applicants who are willing to accept any routes in the general area encompassed by this proceeding should amend their applications to request such relief, but no applicant will be permitted to submit

evidence concerning cities or routes not specifically mentioned in its application." Second, even if one of the applicants had applied for the same route as Eastern it could not have resulted in additional service outside the New England area, as is true in the case of Eastern, because none of the applicants operate south of New York, as Eastern does.

Eastern recognizes the validity of this latter fact[8] by giving certain "answers" "if it be suggested that Eastern's application is different from the others because Eastern has existing routes south of New York which would be incidentally affected by new authorizations in New England" (R. 14-15). Its first "answer" is that Northeast's application "for a local Boston-New York route was included, even though it would affect cities" at a distance comparable to those effected by Eastern's proposal. But Northeast has no proposal "for a local Boston-New York route"[9] in Docket 2196; that proposal was withdrawn prior to the denial of Eastern's motion for consolidation (R. 82, 84-85; Supp., *infra*, pp. 48-50). Eastern's second "answer" is that "any Boston-New York route—even though granted to a carrier having no other route—would necessarily involve through service on Eastern's system south of New York" (Pet. Br. 15). But whether any "through service" resulted from the certification of a Boston-New York route in Docket 2196,[10] it is perfectly clear that no new non-stop service from New England points

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[8] Rhode Island also recognizes this fact by stating (Int. Br. 12-13): "where the applicant requesting consolidation operates an existing service, the service to and from the cities applied for may have some aspects different from other services proposed for the same cities because of the fact that the applicant could render service between the cities applied for on the one hand and the cities already served on the other."

[9] Northeast is already certificated to fly a local Boston-New York route, as the map opposite page 14 of Eastern's brief shows.

[10] Section 404 (a) of the Act only requires air carriers to provide "reasonable through service", and Section 1002 (i) only "*directs*" the Board to "establish through service" when it is "required by the public convenience and necessity" and then only "after notice and hearing."

to points south of New York, duplicating the service of another carrier, would be involved, and that the carriage south of New York would only involve existing services rather than new services. Eastern's proposal alone involves new trunk line services outside the geographical scope of the proceeding under Docket 2196.

It is precisely for this reason that Rhode Island is interested in this proceeding. It states "that Eastern is the only applicant * * * which * * * will give Providence both the local and *nation-wide service* adequately adapted to fulfill its air transportation needs" (Int. Br. 18; italics supplied).

Comparison of service.—Sixteen major airlines have been certificated as trunk line operators and are always referred to as such. Eastern is such a carrier. Twenty-one carriers have been certificated as feeder operators and are always referred to as such. Unrestricted service between major traffic generating centers, such as Boston and New York, is the essence of a trunk line service. Shorter flights between smaller cities with stops at all certificated points on each flight is typical of a local or feeder service.

At the time the Board denied Eastern's motion for consolidation no application consolidated into the proceeding under Docket 2196 requested a Boston-New York route. Eastern's suggestion that there were five such applications is erroneous (Pet. Br. 12 and facing map). Northeast's Boston-New York proposal had been withdrawn; Wiggins' application had been dismissed; and Massachusetts' application had not been filed. New England only said it "is willing to accept" a Boston-New York route (R. 22), and Putnam asked for separate routes from Putnam to Boston and from Putnam to New York. Royal's application involved points north of Boston, and the only new point Island sought for its Long Island route was Newark.

Since Eastern's motion has been denied, Massachusetts has filed an application for a Boston-New York route which it states is for a feeder route, and which the Board consolidated into Docket 2196 on a finding that it proposes

feeder service. Portions of Amendment 1 to Wiggins' application have been reinstated but they only involve the addition of New London and New Haven to its feeder certificate and no Boston-New York service. Yankee Skylines, Inc. filed an application for trunk line service and consolidation in Docket 2196 was refused it for that reason. The applications of New England and Royal have been dismissed.

Considering all of the applications consolidated into Docket 2196 at the time Eastern's motion was denied, or presently, it is evident that all of them propose local or feeder service. They all provide for service to a large number of smaller cities, which is only feasible economically for a feeder operation. Massachusetts specifically states it is seeking authorization to perform feeder services and not one of the applicants has objected to being included in a proceeding which has clearly and repeatedly been stated by the Board to encompass only local or feeder applications. Obviously all of the applicants believe their applications are for local or feeder service. On the other hand, Eastern and Yankee propose semi-long-haul services between major population centers. Their proposals to provide such trunk line services were excluded from the proceeding under Docket 2196 as being beyond its stated scope. Likewise, many other applications for authority to perform trunk line services in the New England area are pending before the Board. These applicants, however, recognizing that their applications are beyond the scope of Docket 2196, have not moved for consolidation. (R. 56-57; Supp., *infra*, pp. 43-44).

Eastern itself has long recognized that its proposal does not belong in Docket 2196. After the report of the first prehearing conference was issued limiting the proceeding "to proposals for local or feeder-line services" (R. 56), Eastern petitioned for leave to intervene (R. 52-54), stating (R. 53):

> "5. Petitioner has not sooner filed this petition for leave to intervene because, until the scope of the proceeding was defined, it was not clear to petitioner

whether it should participate herein as an intervener or as an applicant."

As far back as November, 1947, Eastern, with full knowledge of the scope of the proceeding, plainly stated and acted upon the view that its proper role in the proceeding was as an intervener, not as an applicant. Inconsistently, Eastern now claims it is being irreparably injured because the Board acted upon this view. Plainly Eastern's present position is one of convenience rather than principle.

Eastern argues, moreover, that the applications under Docket 2196 "are not simply 'local or feeder' proposals" because "not one of the applications for the Boston-New York route requests only 'local or feeder' authorization" (Pet. Br. 13). Massachusetts did make such a request (Supp., *infra*, p. 45). The question, however, is not whether applicants specifically requested local or feeder authorization, but rather whether their applications specifically preclude such an authorization. Since Docket 2196 is limited to local or feeder service proposals, applications containing no specific statement on this question which are consolidated without objection clearly must be interpreted as proposing only local or feeder service. But applications which contain a statement which precludes a local or feeder authorization, cannot be so interpreted. Eastern's proposal alone[11] precludes a local or feeder authorization since it requests authority to perform "unrestricted transportation" (R. 40).

Finally, Eastern argues that trunk line proposals were included within the proceeding under Docket 2196, and cites three instances (Pet. Br. 14). Northeast's proposal for a Boston-New York route was withdrawn (R. 82, 84-85),

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[11] New England's application states that it "does not wish to be known as a Feeder-Line but as a regular certified Airline" (R. 21). Since feeder lines receive certificates this statement is difficult to interpret. It may have been a request for a permanent certificate rather than a temporary certificate, which feeder lines have customarily been given. In any event it does not appear to be a restriction on the type of authorization it is willing to accept. (cf. Pet. Br. 14; Int. Br. 14). Moreover, New England has since requested that its application be dismissed, and on April 18, 1949, the Board entered an order dismissing its application (Supp., *infra*, p. 50).

and the Northeast-Wiggins route transfer proposal was dismissed (R. 95), before Eastern was denied consolidation. Patently, Northeast's request to abandon service to New London, Connecticut, and Islip and Riverhead, Long Island (R. 42-43) coupled with Island's request to carry mail over such route on a permanent basis (R. 92-95), does not involve a trunk line proposal.

In summary, Eastern's application differs from any of the applications consolidated into Docket 2196 in that it proposes (1) trunk line service, rather than a local or feeder service and (2) new services to points outside the New England area. On their face, such proposals, involving the duplication of services already certificated to Northeast and American, "would unduly expand the issues and broaden the scope" of the proceeding under Docket 2196. The Board's exercise of discretion in refusing to consolidate Eastern's application, particularly since it had repeatedly and recently considered Eastern's proposal, was not only reasonable but required for the "proper dispatch of business" and the "ends of justice."

The proper administration of the Act requires that the Board have a free exercise of discretion in determining whether applications are to be consolidated for purposes of hearing and decision. The large number of applications filed with the Board and the fact that they are invariably over-lapping, both as to the areas to be served and the type of services to be performed, necessitates the application of the informed judgment of an expert body to questions of consolidation if a hopeless administrative jumble is to be avoided. While this conclusion may be simply stated, it is of overwhelming importance to the operations of the Board. It is for this reason that Congress has conferred discretion upon the Board to decide such matters.

The Courts have refused uniformly to upset an order resting in the discretion of an administrative agency in the absence of a conclusive showing that the exercise of discretion was entirely arbitrary and capricious. *United States Lines Co.* v. *Civil Aeronautics Board,* 165 F. 2d 849, 852 (C.C.A. 2, 1948). This principle is clearly applicable

to orders denying consolidation as here. Judicial intervention does not extend to such matters. *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 138 (1940); *American Trucking Assoc.* v. *U. S.*, 326 U. S. 77, 83, (1945); *American Power & L. Co.* v. *Securities & Ex. Com'n*, 141 F. 2d 606, 614 (C.C.A. 1, 1944), aff'd 329 U. S. 90 (1946); *Pulitzer Pub. Co.* v. *Federal Communications Commission*, 68 App. D.C. 124, 94 F. 2d 249, 252 (1937). Only recently the Supreme Court has vigorously reemphasized the necessity for maintaining the "broad discretion" of administrative agencies in such matters. *Federal Communications Commission* v. *Station WJR*, decided June 6, 1949.

B. *There is no basis in this record for concluding that the route Eastern is seeking "is certain to be awarded to some applicant in the proceeding under Docket 2196" and that failure to grant it consolidation "would effectively foreclose Eastern's right to a hearing."*

Eastern and Rhode Island attempt to simplify their arguments on this point by assuming that the proceeding under Docket 2196 only concerns the question of whether a Boston-New York route shall be certificated, that the issue presented by Eastern's application is the same as the only issue in Docket 2196, and that the issue is bound to be resolved by the award of a Boston-New York route to someone in the proceeding. Thus, Eastern refers to "the route involved in Docket 2196" (Pet. Br. 11; see also 16-21) and Rhode Island refers to "the new route" (Int. Br. 18-23). This is a complete distortion of the proceeding under Docket 2196. As indicated above and by the maps, the proceeding involves a large number of feeder routes throughout New England other than a Boston-New York feeder route. The inference sought to be created that since the proceeding only involves a Boston-New York

route some action is bound to be taken on it has no foundation in fact.

There are no other applications in Docket 2196 which propose "exactly the same points and same service" as Eastern, as Rhode Island contends (Int. Br. 13). As we have shown above, Eastern's application proposes a different type of service and a different area of service than any other application. This alone is convincing proof of the fact that the granting of one or more of these applications, through the issuance of feeder certificates, will not preclude Eastern from later being certificated to perform a trunk line service if the public convenience and necessity so requires.

Eastern and Rhode Island argue, however, that because they believe unrestricted service from Boston to New York-Newark, via Providence, Hartford, and New Haven, is required by the public convenience and necessity, the Board will so find in Docket 2196 (Pet. Br. 17; Int. Br. 18). This substitutes the beliefs of Eastern and Rhode Island for the Board's informed judgment, exercised after notice and hearing, as the determinant of public convenience and necessity under the Act. Actually, no issue and no evidence as to whether such an unrestricted route is required by public convenience and necessity will be before the Board in Docket 2196. Massachusetts proposes to show that public convenience and necessity requires a feeder route from Boston to New York via White Plains, New Haven, Westerly, Newport, Fall River-New Bedford and, either Oak Bluffs, Nantucket, Hyannis, Provincetown and Brockton, or Taunton and Brockton. Proof of such a proposal and the grant of such authorization will neither establish the public convenience and necessity with respect to Eastern's proposal nor preclude its being granted at a later time. New England's proposal was similar to that of Massachusetts but it was not prosecuted at the hearing and has been dismissed. Putnam's proposals for routes from Putnam to Boston and Putnam to New York are only two of the 14 integrated routes it proposes which radiate out from Putnam, where its operations are to be based. Proof that this proposal

or parts of it are required by the public convenience and necessity and will result in a grant of some authority to Putnam affords no basis for concluding that Eastern's proposal is in the public interest or that Eastern will be precluded from receiving favorable consideration on its application at a later date. None of the other applications in Docket 2196 relate in any way to a Boston-New York route.

Even if it were assumed that somehow the Board would be in a position to find in Docket 2196 that the public convenience and necessity requires an unrestricted Boston-New York route, as Eastern proposes, it would not result in the certification of such a route unless it were assumed also that the Board would find that an applicant for such route in Docket 2196 was "fit, willing and able" to provide such transportation. Eastern and Rhode Island hasten to make this latter assumption (Pet. Br. 18; Int. Br. 18). They argue that a holder of a certificate has never been found disqualified to receive a new certificate. But the only certificate holders in Docket 2196 are Northeast (asking for Concord and Manchester), Wiggins (asking for New London and New Haven), and Island (asking for Newark).[12] The only applicants for any sort of a Boston-New York route are Putnam and Massachusetts, and any assumption that they are "fit, willing, and able" substitutes the guesses of interested parties for the informed judgment of the Board, exercised after notice and hearing as the Act provides. Cf. *State Airlines, Inc.* v. *Civil Aeronautics Board, supra.*

It is perfectly clear that there is no basis in fact for Eastern's sweeping assertion that the route it is seeking "is certain to be awarded to some applicant in the proceeding under Docket 2196" (Pet. Br. 11). No applicant has requested an unrestricted trunk line route between Boston and New York, via Providence, Hartford, and New Haven, and the Board has clearly stated that it would not entertain such proposals in the proceeding under Docket 2196. To

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[12] Northeast and Wiggins withdrew their proposals for Boston-New York service prior to the denial of Eastern's motion for consolidation (R. 82, 84-85, 92-95).

conclude that such a route is "certain to be awarded" in such proceeding flies in the face of all reason.

Since there is no basis for concluding that the authorization Eastern seeks will be awarded to another applicant, likewise there is no basis for concluding that Eastern will be foreclosed from receiving the route it seeks in a later proceeding by virtue of having been excluded from Docket 2196. Both Eastern (Pet. Br. 18) and Rhode Island (Int. Br. 19) are acutely aware of the fact that the Board restricted Eastern's service to New England and has repeatedly refused to remove the restriction (R. 76-78). Each asserts that this "is convincing that no more than one local New York-Boston route will be authorized in the proceeding under Docket 2196". In fact, the Board's treatment of Eastern's attempts to remove the restrictions on its New England service is even *more* convincing that *no* New York-Boston trunk line service will be authorized in the proceeding under Docket 2196. Eastern's difficulty does not lie in its exclusion from Docket 2196 but in the fact that the Board has only recently found that such trunk line service is not required by the public convenience and necessity. The only loss to Eastern through the denial of consolidation is the unwarranted advantage of having its application accelerated and heard out of turn and the seeming benefit of a local or feeder service proceeding in which to camouflage its trunk line service proposal.

Both Eastern and Rhode Island stretch and then rely on *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945) to support the contention that Eastern's application should be consolidated into Docket 2196 (Pet. Br. 19-21; Int. Br. 21-23). The Supreme Court's holding in the *Ashbacker* case was a narrow one (326 U.S. at p. 333):

> "We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

In the *Ashbacker* case the applications for radio licenses were "mutually exclusive" because the applications were

for the same authority and it was not *physically* possible to grant both of them. The Communications Commission stated that the simultaneous operation of both applicants "would result in intolerable interference to both" and found that the two applications were "actually exclusive." Such a situation does not exist with respect to air carrier certificates, as the Board pointed out in the *West Coast Case*, 8 C.A.B. (No. 47) 636, 637-638 (1947). The *Ashbacker* case must be stretched to cover new ground if it is to have any application to the case at bar.

But even if air carrier certificates were said to be "mutually exclusive" when the grant of one raised a substantial economic impediment to the grant of another, the principle of the *Ashbacker* case would not require that Eastern be granted consolidation in the case at bar. The crucial distinction is that in the *Ashbacker* case, Ashbacker was required not only to convince the Commission that it should have a license, but also that Fetzer's license should be withdrawn. It was this latter factor which led the Court to conclude that Ashbacker "has been placed under a greater burden than if its hearing had been earlier." But Eastern's application is for a different service and in part in a different area than the proposals heard in Docket 2196. The possible grant of one or more local or feeder routes in Docket 2196 will not foreclose Eastern's application for authority to perform additional trunk line service, and no rehearing or revocation of any such grant will be involved in any way. Eastern has no "greater burden" as a result of having a later hearing because it will not have to displace any successful applicant in Docket 2196 either for physical or economic reasons in order to justify its proposal. Eastern's application and those consolidated under Docket 2196, therefore, are not "mutually exclusive" in the sense of the principle of the *Ashbacker* case or any reasonable extension of it.

It follows from the foregoing that Eastern will suffer no legal injury from the refusal of the Board to consoli-

date its application into Docket 2196. Under these circumstances Eastern has no "right" to consolidation. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Federal Communications Commission* v. *Station WJR*, U.S. Sup. Ct., decided June 6, 1949, Slip Opinion, p. 17. That being so, even under Eastern's views, the order of the Board are interlocutory and this Court lacks jurisdiction to review them.

III. There is nothing in the Board's rules of procedure or in the provisions of the Act which requires the consolidation of Eastern's application with the proceedings under Docket 2196.

In points II, III, and IV of its argument Eastern draws attention to Section 302.7 (b) (2) of the Board's Organizational Regulations and Sections 2, 401 (c), and 1001 of the Act and argues from them that the Board is required to consolidate Eastern's application into the proceedings under Docket 2196 (Pet. Br. 22-28). Unlike the arguments of Eastern previously considered, these contentions raise only questions of law. We shall consider each of the contentions briefly below in relation to the facts of this case.

At the outset, however, it should be made clear that none of the legal positions adopted by Eastern have any bearing upon the outcome of this case. Each of Eastern's arguments rests on its initial assumptions that its application is the same as those considered in the proceeding under Docket 2196 and that its right to a hearing on its application would be denied, in effect, if consolidation were denied to it. Only if those assumptions are correct are its legal arguments valid. But if those assumptions are correct, and if this Court has jurisdiction to review the orders in question, then Eastern is entitled to the relief it requests apart from its legal arguments. On the other hand, if those assumptions are incorrect, as we have previously established, then Eastern's legal arguments are invalid and cannot justify the relief it seeks. It is our position, therefore, that under any circumstances these arguments cannot have a controlling effect. They are only trimmings.

A. *The Board's rules of procedure relating to the "Channeling of Formal Proceedings" do not purport to determine whether particular applications should be heard in a consolidated proceeding.*

Eastern says that the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) and other judicial authorities make the Board's lawful rules and regulations binding upon the Board (Pet. Br. 22, 23-24), and with this general proposition we have no quarrel. It then quotes a portion of Section 302.7 (b) (2) of the Board's Organizational Regulations (12 F.R. 7995) as follows:

> "In proceedings upon applications by air carriers for new routes it is *customary* to assign all pending applications for a *similar* service in the same *general* area for conference at one time." (Italics supplied).

Eastern completely ignores the necessary generality of the italicized words. It recognizes the fact that the "rule" is specifically limited to the prehearing conference but argues that "the fair intent of the regulation" is to apply it to hearings (Pet. Br. 22). This is the basis for its claim that consolidation is required.

The succeeding paragraphs of the foregoing regulation provide in relevant part as follows:

> "(3) The prehearing conference is conducted by the trial examiner. At the conference, applicants and other interested parties state their attitude toward consolidation of the various applications for purposes of hearing and decision, * * *"
>
> "(4) Following the conference a report is prepared by the examiner and forwarded to all parties, setting forth a record of the results of the conference and any rulings which may be necessary on questions arising in connection with the case. * * * [Provision is made for exceptions and a supplemental report.]
>
> "(5) If consolidation of certain applications for hearing and decision was agreed to at the conference, the examiner will recommend an appropriate consolidation order. The Board's subsequent order or notice of hearing, together with the prehearing conference report, will establish the scope of the hearing."

From the foregoing, particularly sub-paragraph (5), it is plain and certain that the consolidation of any particular application into a proceeding is to be determined by order of the Board, not on the basis of this regulation, but on the basis of the examiner's report, the exceptions thereto, and the application. Clearly, the Board did not bind itself to pass upon all questions of consolidation on the basis of the general standard it stated it would "customarily" employ in assigning cases for prehearing conference. No one could reasonably have relied on such a construction.

Eastern attempts to buttress its interpretation of an isolated sentence in the regulation by coupling with it a quotation from the Board's opinion in *Investigation of Local, Feeder and Pick-Up Air Service,* 6 C. A. B. 1 (1944), and arguing that in the past the Board has always followed such interpretation and parties have justifiably come to rely on it (Pet. Br. 23). The opinion referred to was issued in 1944, three years before the regulations in questions were promulgated, and does not constitute an interpretation of those regulations. Moreover, the practice of the Board with respect to consolidations is not the type of action which would give rise to an estoppel since no one can be harmed through reliance upon it. In any event, as this Court has recently noted, "an administrative agency is not bound by its own prior determinations" *State Airlines, Inc.,* v. *Civil Aeronautics Board,* No. 9748, decided April 6, 1949, Slip Opinion, p. 10. Nor can an estoppel arise against an administrative agency in this situation. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (1940). Since 1944, when the cited opinion was issued, the Board has had a wealth of experience with the conduct of route proceedings. That experience has demonstrated that the best results are not always achieved by substantially unlimited area proceedings. The Board has refused, therefore, to consolidate proposals for trunk line services with proposals for local or feeder services. *Additional Service to Florida Case,* Docket 1668, *et al.,* Orders Serial Nos. E-857 (October 6, 1947) and E-1083 (December 29, 1947). Certainly Section 1001 of the Act, which author-

izes the Board to "conduct its proceedings in such a manner as will be conducive to the proper dispatch of business and to the ends of justice," permits the Board to utilize knowledge gained through experience to improve its procedures. Such changes in procedure are neither an abuse of discretion nor legal error. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194 (1947); *Federal Communications Commission* v. *WOKO*, 329, U. S. 223 (1946); *Shawmut Assn.* v. *Securities & Exchange Commission*, 146 F. 2d 791 (C. A. A. 1, 1945).

However, even if Eastern's argument on this point were accepted on its face it would not advance Eastern's case. As we have previously shown, Eastern's application is not "similar" to the applications consolidated under Docket 2196 and raises problems outside the "general area" involved in such proceeding. Eastern's case, therefore, does not fall within the purview of the provision of the Organizational Regulations upon which it relies.

B. *The provisions of the Act that applications shall be heard "as speedily as possible" and that proceedings before the Board may be conducted "in such a manner as will be conducive to the proper dispatch of business and to the ends of justice" do not require a consolidation which "would unduly expand the issues and broaden the scope" of the proceeding and require other applicants before getting an initial determination on their applications to wait and attend upon the litigation of extraneous issues raised by Eastern which the Board had recently heard and decided against Eastern.*

Eastern contends that the provisions of Sections 401(c) and 1001 of the Act quoted in the heading above require the Board to grant it consolidation (Pet. Br. 24-26). Such contentions come with ill grace from Eastern. The requirement that applications be heard "as speedily as possible" is applicable equally to applications filed by carriers other than Eastern. Many of the applications consolidated under Docket 2196, and many other applications pending before the Board, antedate Eastern's by substantial periods. Yet

Eastern would have the Board sidetrack them in favor of its application, or require the applicants to wait and attend at a hearing while Eastern litigates extraneous issues. The brazen character of Eastern's approach is manifest from the fact that the substance of Eastern's application has been repeatedly and recently heard and decided by the Board. The eloquent facts in this connection are set forth in American's motion to dismiss Eastern's motion to consolidate (R. 76-78). Eastern's attempt to secure consolidation is a thinly-veiled attempt to secure a hearing on its application out of turn. Nothing in the Act requires the Board to countenance such an attempt. *Federal Communications Commission* v. *Pottsville Broadcasting Company, supra; American Trucking Assoc.* v. *U. S.*, 326 U. S. 77, 83 (1945). And this Court has declared that it "cannot direct in advance the order of precedence in the [Board's] calendar." *WJR, The Goodwill Station, Inc.* v. *Federal Communications Commission,* App. D. C., No. 9464, decided October 7, 1948. The Supreme Court has recently noted its "complete agreement" with this Court on that point. *Federal Communications Commission* v. *Station WJR,* decided June 6, 1949, Slip Opinion, pp. 6-7.

The authorization to the Board to conduct "its proceedings in such a manner as will be conducive to the proper dispatch of business and to the ends of justice" alone justifies the Board's action. The "business" referred to in the Act is the Board's "business," not Eastern's. The record clearly shows, and the Board found, that the consolidation of Eastern's application "would unduly expand the issues and broaden the scope" of the proceeding. The proper dispatch of the Board's business is not achieved by such a consolidation. Nor are the "ends of justice" served by according shabby treatment to a group of applicants in order that Eastern may achieve an unjustified benefit.

As in the case of Eastern's other legal arguments its contentions here are devoid of merit. They rest entirely on the assumptions that its application is the same as the other applications under Docket 2196 and that the Board's refusal to consolidate its application in such proceeding

would effectively deprive it of a hearing on its application. Since we have already demonstrated the erroneous nature of these assumptions, these make-weight arguments of Eastern likewise must fall.

C. *The "public interest" does not require the consolidation of Eastern's application into Docket 2196 in order to permit the Board to give concurrent consideration on a comparative basis to applications for feeder line services in one area and Eastern's proposal for trunk line service extending to another area.*

On the basis of Section 2 of the Act and various decisions of the Board Eastern contends that its application must be consolidated under Docket 2196 in order that the Board may give effect to considerations of the "comparative public interest" in certificating a carrier in such proceeding (Pet. Br. 27-28). There is no question but that the application of the principle of comparative consideration is in the public interest in many situations. Wherever appropriate the Board has employed the principle, and it will undoubtedly continue to do so. However, the principle has no significance, and does not assist in effectuating the policies of the Act, when unlike proposals are submitted to the Board for consideration. As we have shown, Eastern's application is for a trunk line service which will substantially increase service and competition outside the area, whereas the applications consolidated under Docket 2196 propose local or feeder line services wholly within the area. Since Eastern's proposal is not comparable to the proposals consolidated in Docket 2196 there is no occasion for comparative consideration.

We wish to reiterate the point that this argument of Eastern's, like those previously considered, draws its vitality solely from the assumption that Eastern's application is the same as the applications consolidated under Docket 2196. That assumption we have shown to be incorrect. It follows that the argument is invalid and affords no basis for requiring the Board to consolidate Eastern's application into Docket 2196.

IV. The Board's findings in support of its order denying consolidation concisely state the basis for its decision and, considered in the light of the other pleadings of record, clearly conform to all requirements of law.

Eastern contends finally that the Board's order denying its motion to consolidate is not supported by the findings of fact required by Section 1005 (f) of the Civil Aeronautics Act and Section 6 (d) of the Administrative Procedure Act (Pet. Br. 29-30). While Eastern has not referred to the relief to which it would be entitled if this contention were sustained (cf. Pet. Br. 36-37), it is clear that in such a circumstance this Court would only remand the orders to the Board with directions to make additional findings. In view of the clarity of the record at this time, as disclosed below, we believe that such a remand would serve no useful purpose.

The relevant statutory provisions are the following: Section 1005 (f) of the Act requires that "every order" [13] of the Board "shall set forth the findings of fact upon which it is based."

Section 6 (d) of the Administrative Procedure Act provides as follows:

> "(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written applica-

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[13] Despite the use of the words "every order", we do not think this provision is applicable to interlocutory, procedural orders such as those under consideration. As this Court pointed out in *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 68 App. D. C. 282, 96 F. 2d 554 (1938) such findings are necessary to permit a "reviewing court" to exercise its functions properly. See also *Virginian Ry.* v. *United States*, 272 U. S. 658, 675, (1926). But where, as here, the orders in question are not reviewable, a strict requirement as to findings may be dispensed with. The words "every order" in Section 1005 (f) should be read "every final order" just as the words "any order" in Section 1006 (a) of the Act, establishing the orders of the Board subject to judicial review, are read "any final order." See the Board's Memorandum In Support Of Motion To Dismiss, pp. 6-9. Clearly Section 1005 (f) establishes no independent basis for review of the validity of an order which is not otherwise subject to review. Our discussion in this point of the brief is predicated on the argumentative assumption that the Court will assume jurisdiction to review the orders in question.

> tion, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds."

Section 8 (b) of the Administrative Procedure Act provides in relevant part as follows:

> "(b) SUBMITTALS AND DECISIONS.—* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

In the Administrative Procedure Act, the latest Congressional pronouncement on this subject, a clear distinction has been drawn between the kind of explanation to be made by an administrative agency in denying a "request" in an agency proceeding and in issuing a decision. In the former case a "simple statement of procedural or other grounds" is adequate while in the latter a more elaborate reasoned opinion is required. See *Attorney General's Manual on the Administrative Procedure Act (1947)*, pp. 69-70, 86-87. Assuming that Section 1005 (f) of the Civil Aeronautics Act is applicable to interlocutory, procedural orders such as those in question, it is submitted that it requires no more with reference to such orders than does Section 6 (d) of the Administrative Procedure Act, namely, a "simple statement of procedural or other grounds" for denying Eastern the consolidation it requested.

The Board's order denying Eastern's motion to consolidate was based upon its finding that "consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the scope of the above-entitled proceeding" (R. 94). Not only was this "self-explanatory", within the meaning of Section 6 (d) of the Administrative Procedure Act in the light of what had gone before, but it constituted a "simple statement of the pro-

cedural or other grounds" for denying the request and the "findings of fact" upon which the order was based. These conclusions become crystal clear upon brief scrutiny of the principal documents of record before the Board when it entered the orders in question.

The filing of Eastern's application and its consolidation into the proceeding under Docket 2196 was discussed in detail at the second prehearing conference as is evidenced by the examiner's report of this conference (R. 84-85). The examiner reported Eastern's proposal, the opposition of Northeast and American, (carriers already certificated to perform a service competitive to that proposed by Eastern), his own statement that "he was unable to see any relation between the proceeding as it now stands and Eastern's proposal, and that in his opinion the Eastern proposal would enlarge the scope of the proceeding", and his further statement that "he would be unable to recommend that it [Eastern's application] be included in this proceeding" (R. 84-85). Thereafter Eastern filed its application and its motion to consolidate the application under Docket 2196 (R. 39-41, 71-76). The motion itself recognizes that the application "involves the question of the improvement of Eastern's services between points south of New York/Newark on the one hand (Trenton, Philadelphia, Atlantic City, Wilmington, Baltimore, Washington, Richmond and Charleston, W. Va.) and the New England points on the other" (R. 73-74), but argues strenuously that consolidation should nevertheless be permitted (R. 74-75). American then filed a motion to dismiss the motion to consolidate (R. 76-79), pointing out (R. 76):

> "The primary purpose of Eastern's application is to obtain unlimited participation in the Boston-New York and Boston-Washington markets, and such an application has no place in a proceeding otherwise involving nothing but feeder-type services. Eastern seeks authorization for no service that is not already authorized over the routes of at least one carrier. It seeks to add no new points to its own routes; its application does not envisage feeder-type service and would not even require Eastern to provide a truly local service."

In the light of this background, and the fact that in the same order the Board expressly approved the limitations on the scope of the proceeding set forth in the prehearing conference reports [14] (*supra,* pp. 14-16), the basis of the Board's order denying consolidation is clearly presented to both Eastern and this Court by its finding that the consolidation of Eastern's application into the proceeding under Docket 2196 "would unduly expand the issues and broaden the scope" of such proceeding. It is submitted that under all the circumstances the Board's finding complies with all requirements of law and that no useful purpose would be served by remanding the orders to the Board with directions to make further findings.

CONCLUSION

For the foregoing reasons, the petition for judicial review should be dismissed for lack of jurisdiction or the orders of the Board should be affirmed.

Respectfully submitted.

EDWARD DUMBAULD,
WILLIAM D. MCFARLANE,
Special Assistants to the Attorney General,
Department of Justice, Washington, D. C.
EMORY T. NUNNELEY, JR.,
General Counsel, Civil Aeronautics Board.

HERBERT A. BERGSON,
Assistant Attorney General.
WARREN L. SHARFMAN,
Attorney, Civil Aeronautics Board.

JUNE 1949

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[14] In granting Wiggins leave to amend its application in Docket 2572 the Board added the following proviso: "*Provided* That said amended application shall not propose services beyond the scope of the issues in the above-entitled proceeding, as defined in the prehearing conference reports served November 7, 1947 and September 30, 1948" (R. 95).

SUPPLEMENT

Documents relating to procedural steps occurring in the proceeding under Docket 2196 since the Board's orders denying consolidation of Eastern's application under Docket 3501:

1. Letter from United Airlines dated October 14, 1948:

"Mayer, Meyer, Austrian & Platt
Continental Illinois Bank Building
Chicago, 4

October 14, 1948.

Mr. Edward T. Stodola, Examiner,
Civil Aeronautics Board,
Washington 25, D. C.

DEAR MR. STODOLA:

Re: Service in New England States Case
Docket 2196, et al.

We are in receipt of a copy of the prehearing conference report served September 30, application by Eastern Air Lines dated September 27, copy of a motion by Eastern for the consolidation of said application for hearing in the above case, and a copy of a letter dated October 9, 1948, from counsel for Eastern Air Lines to you.

It appears from the foregoing that Eastern is seeking to have incorporated for hearing in this proceeding an application which involves, among other things, service to Hartford-Springfield. You will recall that United has on file an application, Docket No. 3044, to add Springfield as an intermediate point on its route to Boston. At the original prehearing conference United took the position that it was willing that hearing on that application be deferred until hearing on somewhat similar pending applications filed by Eastern, American and others was held. The report of the original prehearing conference contained a statement that United's and other similar applications would more appropriately be heard in a separate proceeding. With that in mind United has not petitioned for leave to intervene in the above case and did not intend actively to participate in it. However, this is to advise that if Eastern's application, which is the subject of the motion and letter referred to above, is consolidated for

hearing in this proceeding, United requests that its application, Docket No. 3044, also be consolidated for hearing and that it be granted such other relief as may be appropriate in the light of the final action taken on Eastern's request.

Copies of this letter are being forwarded to the parties listed in the report of the prehearing conference dated September 30.

Very truly yours,

MAYER, MEYER, AUSTRIAN & PLATT,

(S.) By JOHN T. LORCH,
JOHN T. LORCH."

JTL:MS.

2. Excerpt from Amendment No. 1 to the application of Island Air Ferries, Inc., Docket 3518, dated January 20, 1949:

* * *

"3. Application is made herein for an amendment of applicant's certificate of public convenience and necessity so to authorize applicant to engage in scheduled air transportation of persons, property and mail as follows:

* * *

b. * * * thus amending applicant's certificate so as to add the intermediate point Newark, N. J. and so as to authorize applicant to engage in air transportation with respect to mail, in addition to authorization heretofore made."

* * *

3. Excerpt from Amendment No. 3 to application of Putnam Airlines, Docket 2757, filed January 24, 1949:

* * *

"(2) Putnam Airlines desires the additional following routes:

Route No. 14—Between Putnam, Conn., and Worcester, Mass., Woonsocket-Pawtucket, R. I., Fall River, Mass., New Bedford, Mass., Westerly, R. I., Waterbury, Conn., Springfield, Mass.

Route No. 15—Between Putnam, Conn., and Springfield, Mass., Waterbury, Conn., Westerly, R. I., New Bedford, Mass., Fall River, Mass., Woonsocket-Pawtucket, R. I., Worcester, Mass."

* * *

4. Letter from Massachusetts Airlines to the Board with reference to the scope of its application under Docket 3604:

"POWELL, LEAR & GAINES,
Attorneys at Law,
Washington

February 4, 1949.

Civil Aeronautics Board,
Washington 25, D. C.

Re: Massachusetts Airlines—Docket No. 3604; Service in New England States Case—Docket No. 2196 et al.

GENTLEMEN:

The purpose of this letter is to clarify the application of Massachusetts Airlines for a certificate of public convenience and necessity (Docket No. 3604) filed with the Board January 3, 1949.

Massachusetts Airlines intends that its application, Docket No. 3604, be construed as an application for local and feeder service in the New England area and not as an application for trunk line service.

At the time that Massachusetts Airlines' application was filed with the Board, the Company had not made a complete economic survey of the New England area although, by virtue of its past experience, it was able to designate the general areas in which it proposes additional airline service. Accordingly, paragraphs 3, 4 and 10 of the application were drawn up with the thought in mind that additional intermediate points would be added when the economic survey was completed.

An intensive economic survey is now being made and the results thereof to date indicate that North Adams, Northampton, Willimantic, Fall River and Taunton should be added as intermediate points on the routes proposed between Boston and Albany (routes 2 and 3). It is not believed that a formal amendment to the

application is necessary in order to include these intermediate points. In the event, however, that the Board believes that an amendment is necessary, we respectfully request that the Board consider this letter as a request for authority to include the above cities as intermediate points on routes 2 and 3.

Massachusetts Airlines is willing to accept any reasonable restriction which the Board may include in any certificate of public convenience and necessity issued to Massachusetts Airlines in order to prevent the Company from operating a trunk line service.

In accordance with the application of Massachusetts Airlines in Docket No. 3604, we wish to emphasize that the Company stands ready and willing to operate any local and feeder airline service which the Board deems to be required by the public convenience and necessity in the New England area.

Very truly yours,

(S) Coates Lear,
Attorney for E. Anthony & Sons, Inc.,
Doing Business Under the Name and
Style of Massachusetts Airlines.

Copies to all applicants''

5. Letter from Wiggins to the Board's Examiner with reference to the scope of its application under Docket 2572:

"GERALD P. O'GRADY
Attorney at Law
1025 Connecticut Ave.
Washington 6, D. C.

March 10, 1949.

Examiner Edward T. Stodola
Civil Aeronautics Board
Washington 25, D. C.

Re: Additional Service in New England States Case Docket No. 2196 et al.

DEAR MR. STODOLA:

I have received an inquiry from a party in the above-entitled proceeding as to what portions, if any, of Amendment No. 1 to the application of Wiggins Airways, in Docket No. 2572, would be prosecuted. Fol-

lowing your suggestion I am sending copies of this letter to all parties to advise them with respect to our position.

Wiggins Airways intends to prosecute at the hearing in the above-mentioned case the following portions of Amendment No. 1 to its application in Docket No. 2572:

(1) Paragraph IV, subparagraph (a) thereof;

(2) that portion of Paragraph IV, subparagraph (b) involving extensions from Providence and Willimantic to New London and New Haven;

(3) Paragraph IV, subparagraph (d) thereof.

Wiggins Airways has no intention of prosecuting the remaining portions of Amendment No. 1 to its application in Docket No. 2572.

Very truly yours,

(S) Gerald P. O'Grady,
Attorney for E. W. Wiggins,
Airways, Inc.

GPO:AS
cc: All Counsel of Record"

6. Excerpt from Amendment To Application of Massachusetts Airlines, Docket 3604, filed March 15, 1949:

* * *

"III

Applicant requests authority, under a permanent or temporary certificate of public convenience and necessity, to engage in scheduled air transportation of persons, property and mail as follows:

1. Between the terminal point New York, N. Y., the intermediate points White Plains, N. Y.; New Haven, Conn.; Westerly, R. I.; Newport, R. I.; and Fall River-New Bedford, Mass.; and (a) beyond the intermediate points Fall River-New Bedford, Mass., the intermediate points Oak Bluffs (Martha's Vineyard), Mass.; Nantucket, Mass.; Hyannis, Mass.; Provincetown, Mass.; and Brockton, Mass.; and the terminal point Boston, Mass.; and (b) beyond the intermediate points Fall River-New Bedford, Mass., the intermediate points Fall River-New Bedford, Mass., Mass., and the terminal point Boston, Mass.

2. Between the terminal point Albany, N. Y., the intermediate points Adams-North Adams, Mass.; Pittsfield, Mass.; Northampton, Mass.; Springfield, Mass.;

Hartford, Conn.; Willimantic, Conn.; and the intermediate point Providence, R. I.; and (a) beyond Providence, R. I., the intermediate points Newport, R. I.; Fall River-New Bedford, Mass.; Taunton, Mass.; and Brockton, Mass.; and the terminal point Boston, Mass.; and (b) beyond the intermediate point Providence, R. I., the intermediate points Taunton, Mass., and Brockton, Mass., and the terminal point Boston, Mass."

* * *

7. Excerpt from transcript of proceedings before an Examiner of the Civil Aeronautics Board on April 1, 1949, in the *Additional Service In New England States Case,* Docket 2196 *et al.,* Vol. 5, pp. 700-702:

* * *

"By Mr. Harlan: [Counsel for Eastern Airlines, Inc.]

Q. Mr. Gardner [President Northeast Airlines, Inc.], is Northeast an applicant in this proceeding to place Hartford, New Haven, and Bridgeport on its Boston-New York route?

A. No, we are withdrawing that, and in my understanding of the present thinking in the application of the Rheinstrom report, there would be no particular sense in going in and duplicating the existing service of the inter-regional carriers, and Northeast Airlines does not feel that the fact that other inter-regional carriers are giving that service, just because they were desirable points, on Charlie's report, that we ought to go in and duplicate that service and hang the bill on the Government.

Our thinking would be that we would not duplicate the service offered by the present inter-regional carriers.

Q. Well, then, when you say on page 2 of your statement, which has been marked NEA-2, that you are ready, willing and able to undertake the responsibility of service to any city and over any route segment which the Board believes should be certificated, you do not include a route between Boston and New York by way of Hartford-New Haven-Bridgeport, is that right?

A. Glenn, I think if the Board saw fit to duplicate it, that we will stand ready to do it.

We certainly would not apply for it. We would not recommend it. We do not think that kind of dupli-

cation is obviously necessary. In fact, we think it is obviously unnecessary, and we do not believe the Board would do that thing. If they do, we certainly will go in there. If the existing carriers are not giving good enough service, and they think they should put someone else in, then we—if we can do it to their benefit, will do it.

Examiner Stodola: Just as a matter of procedural clarification, paragraph 1 of NEA-2, was not in your application. You did not formally request that it be in there?

Mr. Foley: [Counsel for Northeast] At the prehearing conference, we stipulated if Eastern did not intervene we would not introduce any evidence in favor of that or urge it in any way.

Examiner Stodola: You mean, if Eastern's application was not consolidated?

Mr. Foley: That is right.

Examiner Stodola: That was my understanding. That is not part of the Northeast application in this case.

Mr. Foley: I called attention to the last sentence of the first paragraph of NEA-2,* which so states that the Concord one is the only proposal which remains consolidated in this proceeding.

Examiner Stodola: Very well. Proceed, Mr. Harlan.

By Mr. Harlan:

Q. I just wanted to get this clarified. I saw what was said on page 1 of NEA-2, but I also saw what was said on page 2 of the same statement. I am also aware of the fact that Northeast has a catch-all clause in its application. I also heard Mr. Gardner say he was willing to operate anything which is in the Rheinstrom report, and that segment is in the Rheinstrom report, and I just want to point out whether Northeast considers itself disqualified to receive any such segment as that in this proceeding.

Mr. Foley: Mr. Examiner, our position is we are not asking for it. We urge it not be done, but if the Board insists on our doing it, we would be glad to do it.

---

* This sentence reads as follows: "Of these three original proposals the second, relating to Concord and Manchester, is the only proposal which remains consolidated in this proceeding."

Examiner Stodola: That is my understanding of the testimony of the witness.

Let us proceed."

* * *

8. Civil Aeronautics Board Order Serial No. E-2726, dismissing applications of New England and Royal in Docket 2196, issued April 18, 1949:

"UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Orders
Serial Number E-2726

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 18th day of April, 1949.

Docket No. 2196 *et al.*

In the matter of the applications of NEW ENGLAND CENTRAL AIRWAYS SYSTEM, INC., and other applicants for certificates of public convenience and necessity under Title IV of the Civil Aeronautics Act of 1938, as amended, known as the SERVICE IN NEW ENGLAND STATES CASE.

ORDER DISMISSING APPLICATIONS

The application of New England Central Airways, Inc., under Docket No. 2196 and the application of Royal Air Lines, under Docket No. 2925, having been consolidated in the above-entitled proceeding and having been assigned for hearing with other applications consolidated in said proceeding;

Notice of the formal hearing before an Examiner of the Board, commencing on March 28, 1949, having been mailed to the aforementioned parties and all other parties, on February 16, 1949;

Formal hearing having been held before the Examiner on March 28, 1949 to April 1, 1949, inclusive, in Court Room 4, Twelfth Floor, Federal Building, Devonshire Street between Milk and Water Streets, Boston, Massachusetts;

The President of New England Central Airways, Inc., having requested during said hearing that the application of said applicant under Docket No. 2196 be dismissed; and

Royal Air Lines having failed to appear at said hearing and having failed to indicate otherwise its intention to prosecute its application under Docket No. 2925;

IT IS ORDERED, That the applications of New England Central Airways, Inc., Docket No. 2196, and Royal Air Lines, Docket No. 2925, be and they are hereby dismissed.

By the Civil Aeronautics Board:

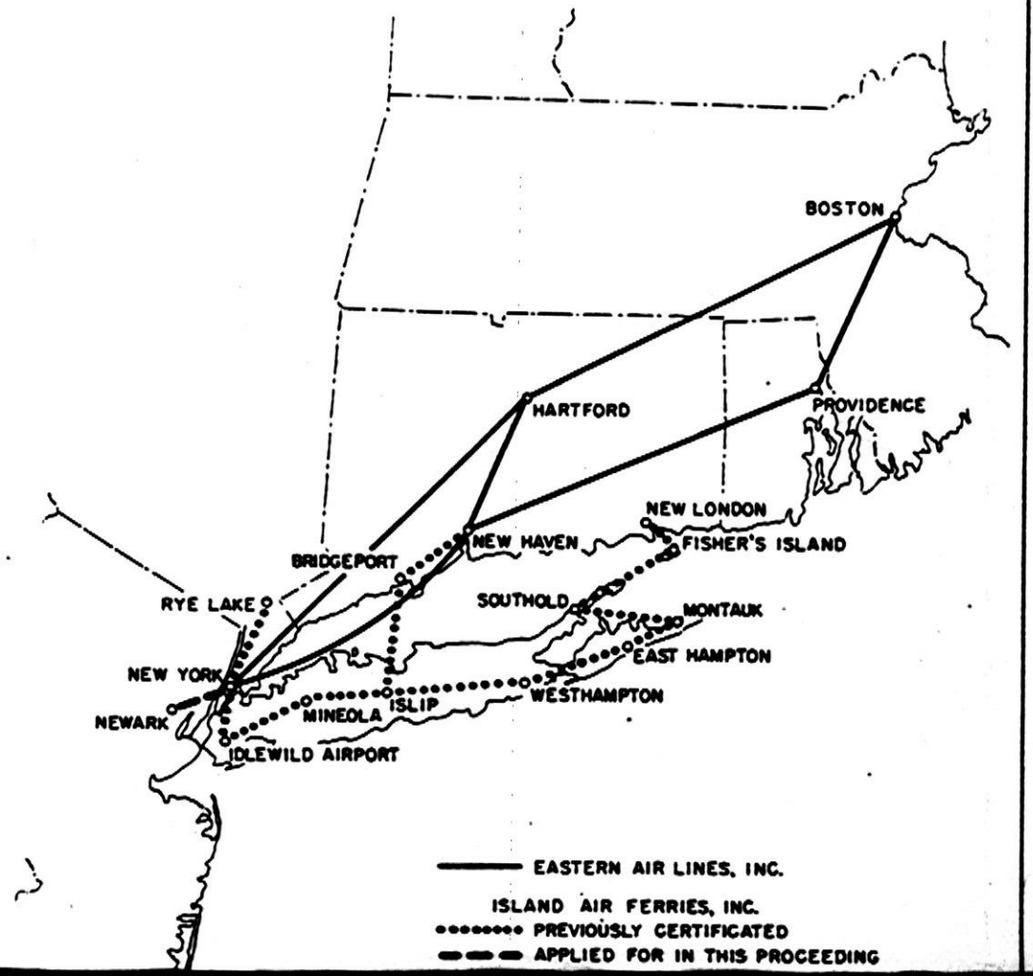
(S) M. C. Mulligan,

(SEAL) Secretary.

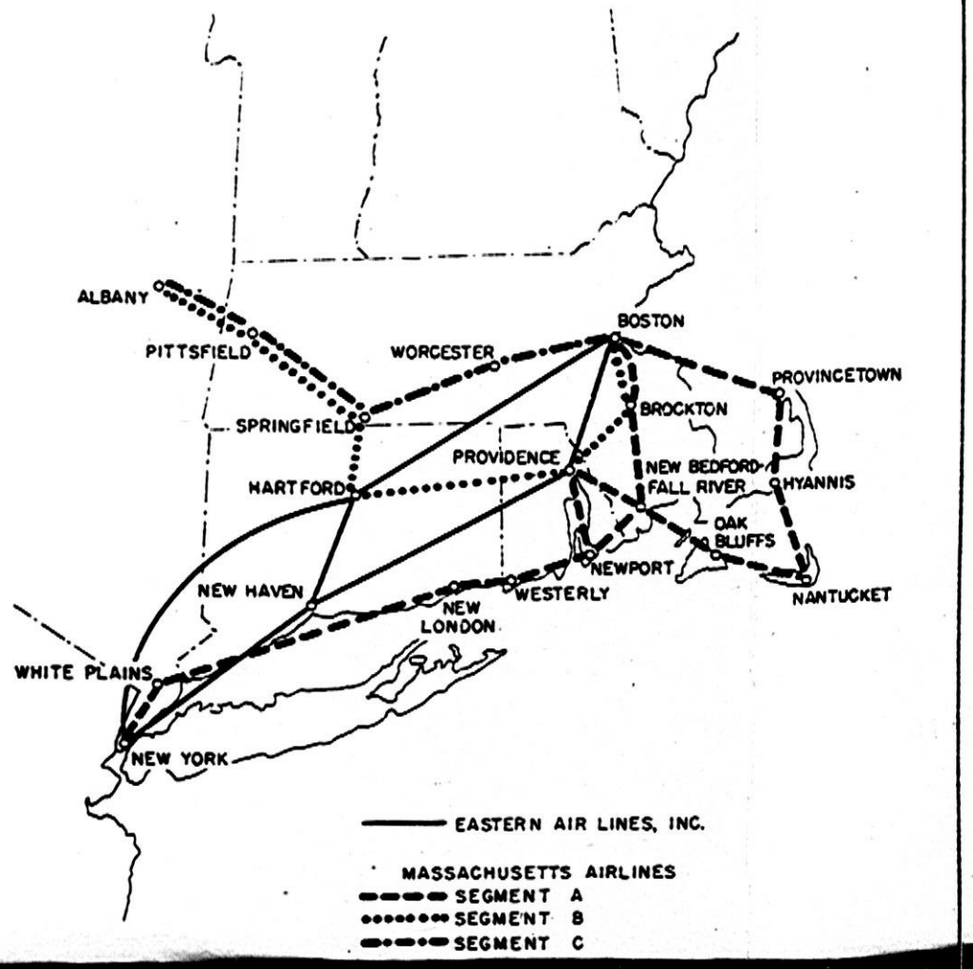
☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 842020 699

COMPARISON OF EASTERN AIR LINES A
WITH PRINCIPAL APPLICATIONS CONSOLIDATED
DOCKET NO. 2

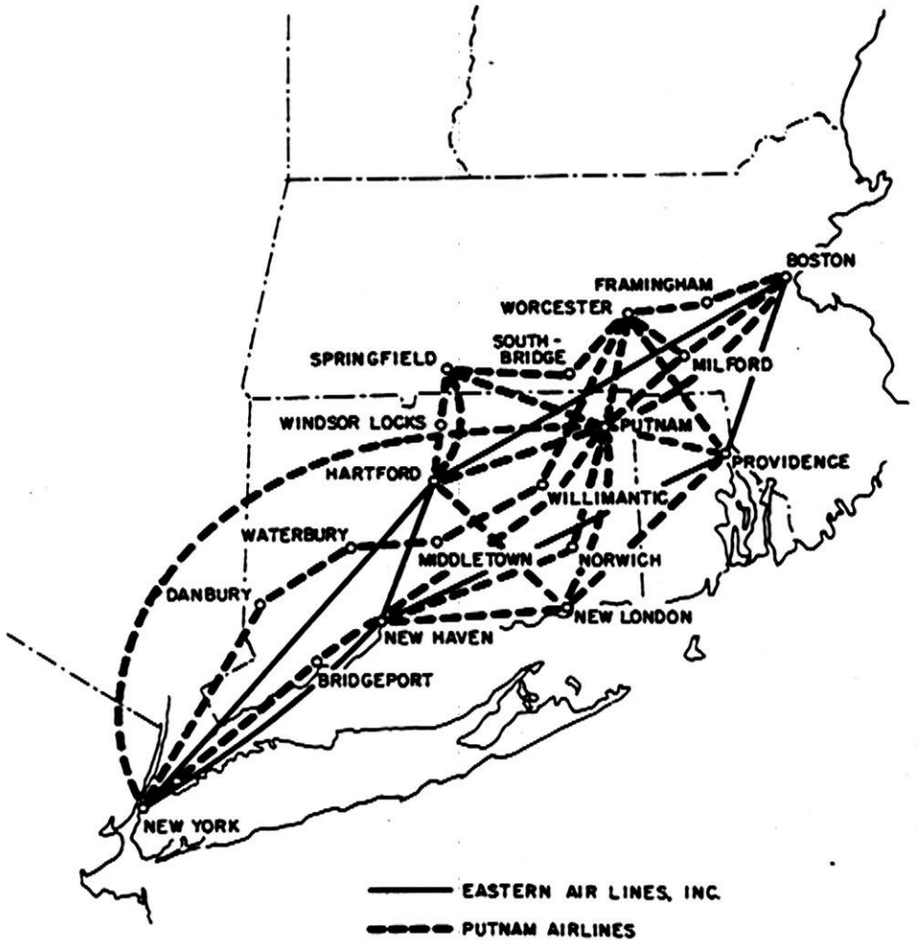
APPLICATION OF ISLAND AIR FERRIES, INC.
DOCKET NO. 3518
(R. 41-42)



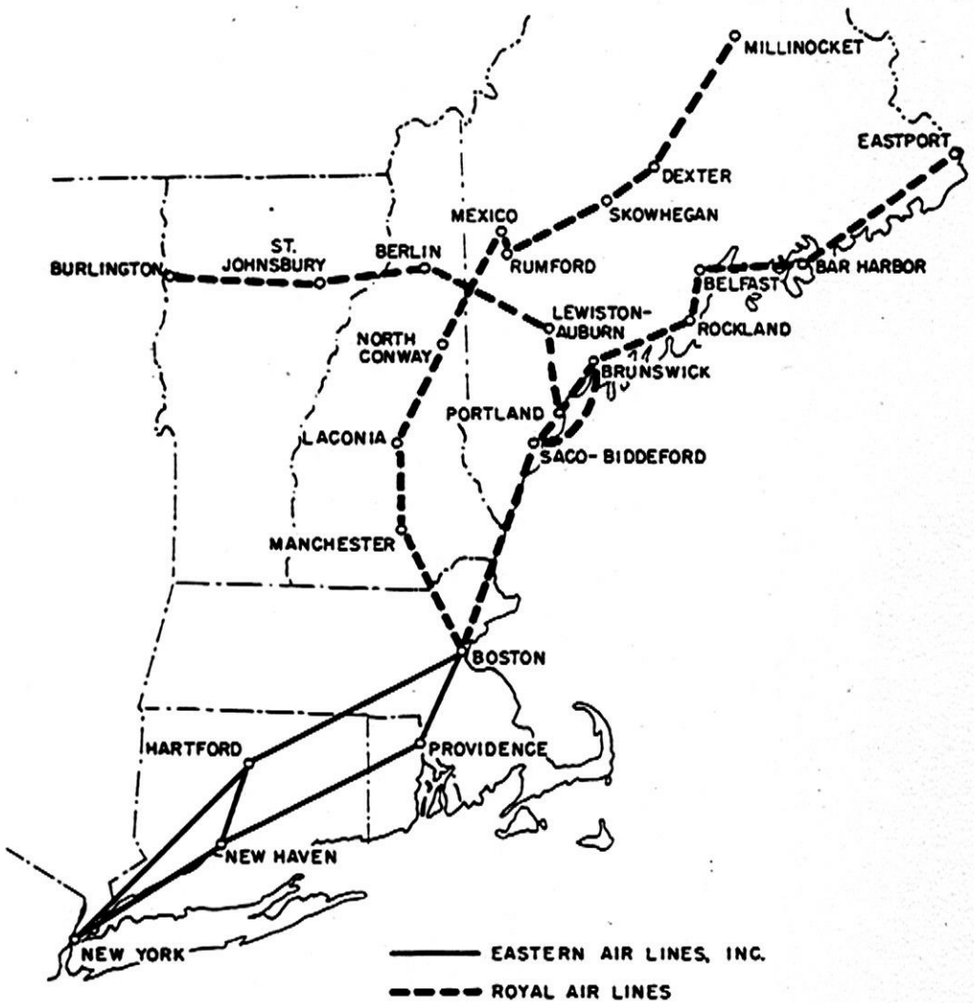
APPLICATION OF MASSACHUSETTS AIRLINES
DOCKET NO. 3604
(PET. BR., SUP. B, 46)



APPLICATION OF PUTNAM AIRLINES
DOCKET NO. 2757
(R. 23-25)



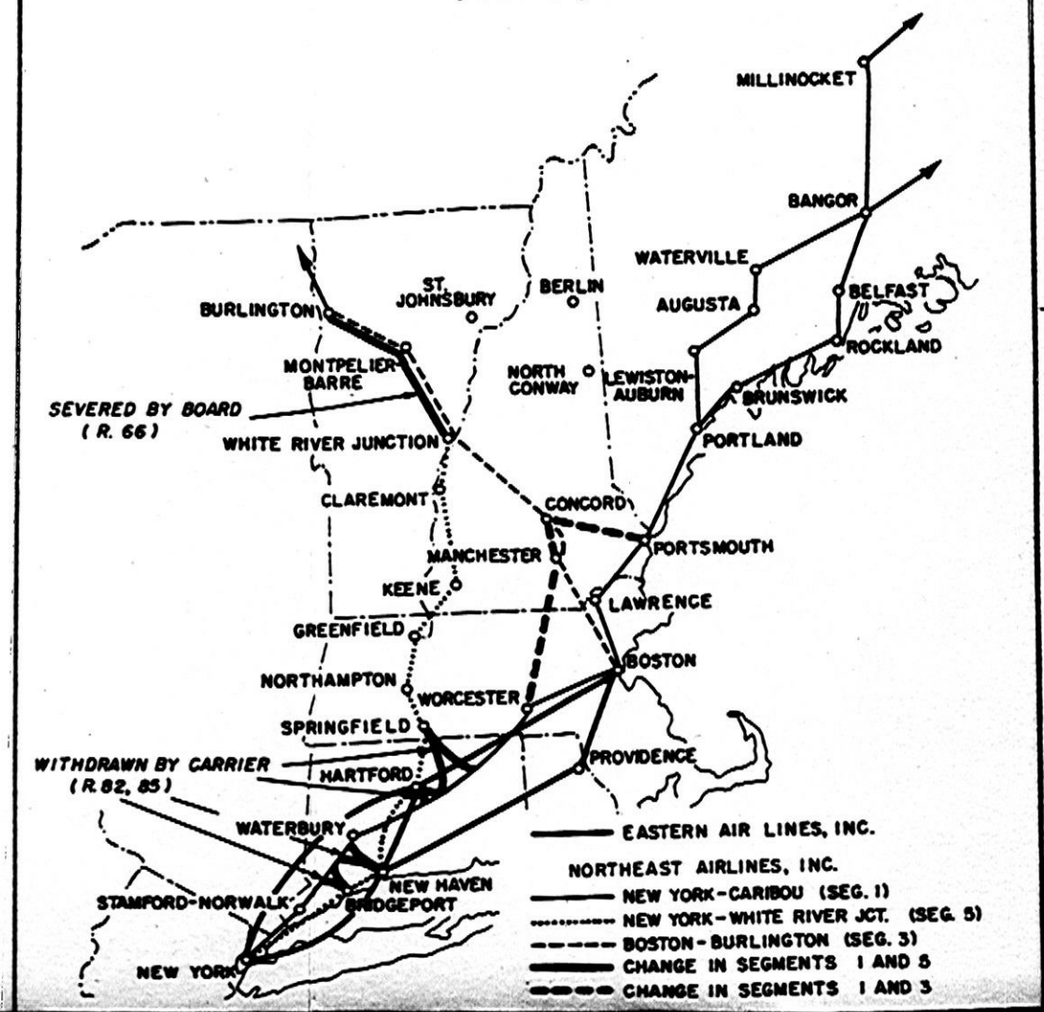
APPLICATION OF ROYAL AIR LINES
DOCKET NO. 2925
(R. 25-26)



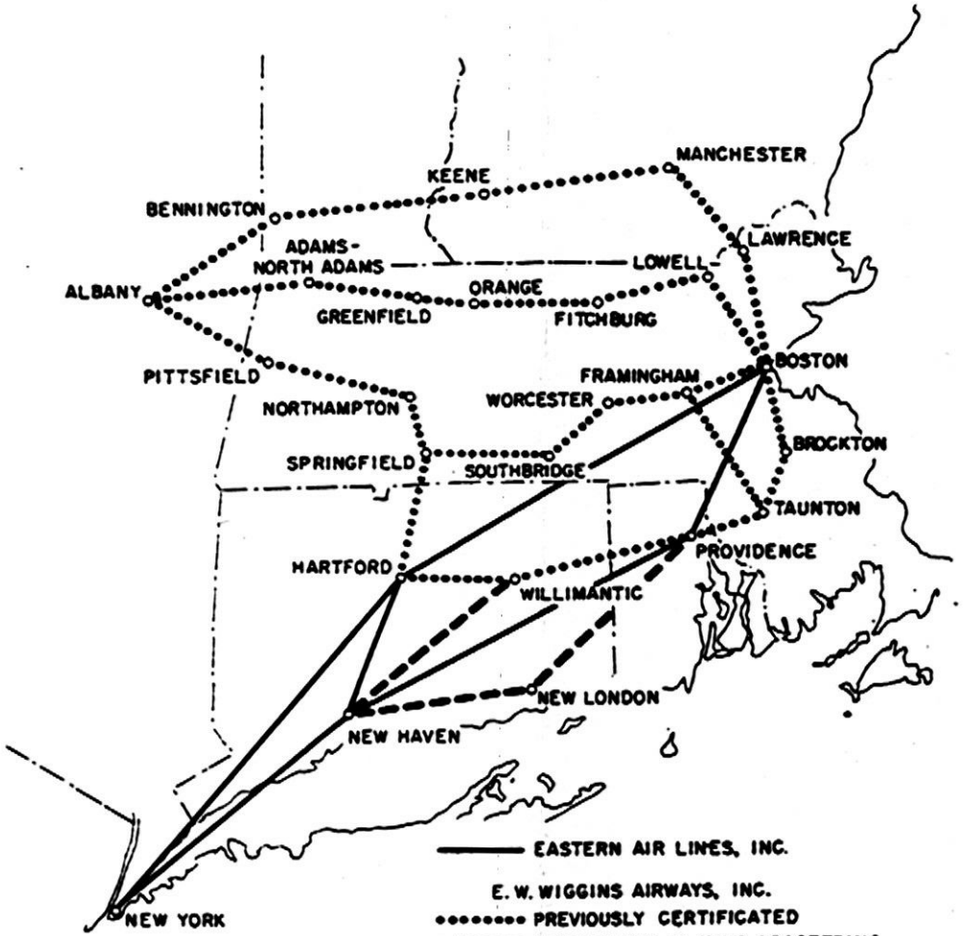
PPLICATION UNDER DOCKET NO. 3501
OR CONSIDERED FOR CONSOLIDATION UNDER
196 ET AL

APPLICATION OF NEW ENGLAND CENTRAL AIRWAYS SYSTEM
DOCKET NO. 2196
(R. 19-23)

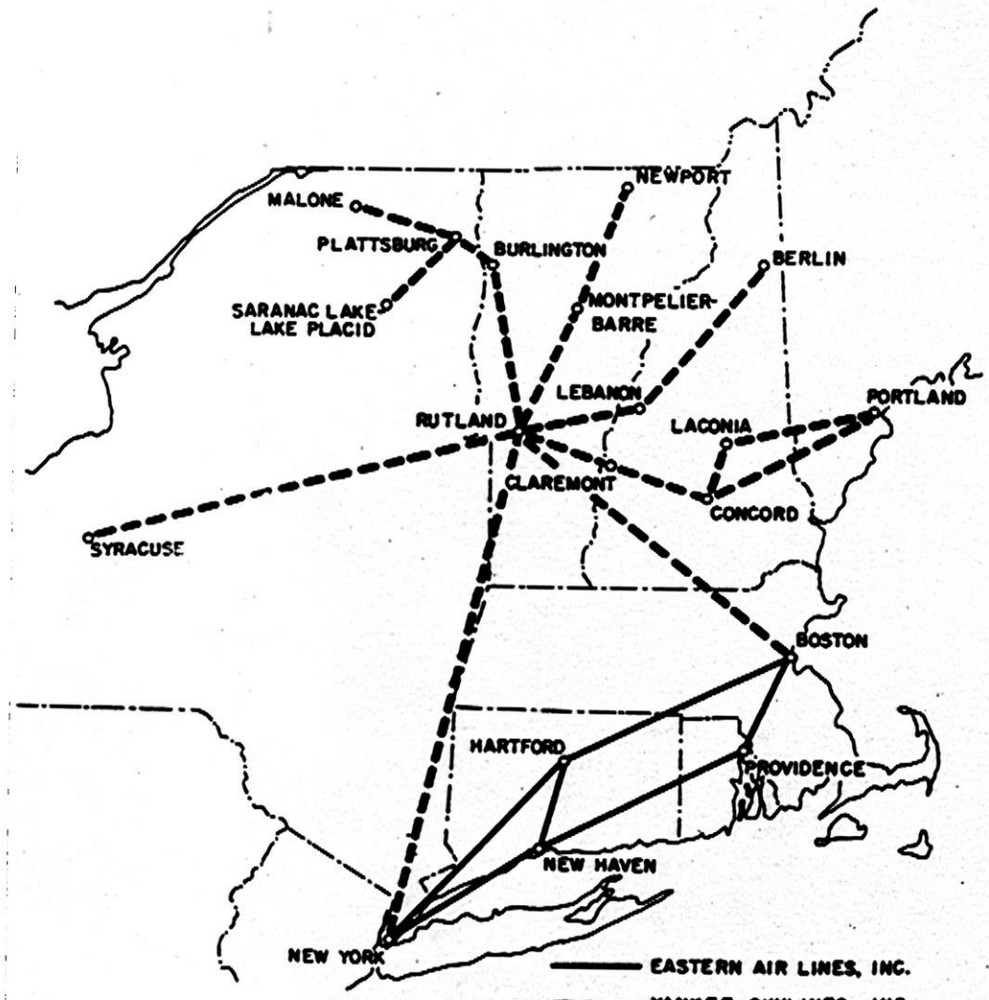
APPLICATION OF NORTHEAST AIRLINES, INC.
DOCKET NO. 3182
(R. 28-29)



APPLICATION OF E. W. WIGGINS AIRWAYS, INC.
DOCKET NO. 2572
(R. 46-47)



APPLICATION OF YANKEE SKYLINES, INC.
DOCKET NO. 3584
(PET. BR., SUP. B, 48-49)



REPLY BRIEF OF EASTERN AIR LINES, INC., PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 10099

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

Petition for Judicial Review of Orders of the Civil Aeronautics Board

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
825 Citizens & Southern National Bank Building,
Atlanta, Georgia.

LLEWELLYN C. THOMAS,
Hibbs Building,
Washington, D. C.

Attorneys for Eastern Air Lines, Inc.

GAMBRELL, HARLAN & BARWICK,
825 Citizens & Southern National Bank Building,
Atlanta, Georgia,
Of Counsel.

United States Court of Appeals for the District of Columbia Circuit

FILED OCT 3 1949

Joseph W. Stewart
CLERK

October 3, 1949

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---

REPLY BRIEF OF EASTERN AIR LINES, INC., PETITIONER

Introduction

The brief filed by the Respondent Civil Aeronautics Board in this case contains many and repeated inaccuracies which might be misleading unless corrected. Therefore, Petitioner Eastern Air Lines, Inc. is filing this reply brief.

The basic issues to be decided in this case are:

(1) Whether the Board acted lawfully in refusing to consolidate Eastern's application under Docket 3501 with

the proceeding under Docket 2196 in view of (a) the fact that Eastern's application requests the same Boston-New York/Newark route sought in other applications consolidated with that proceeding, and the grant of any other such application would effectively preclude the later granting of Eastern's application; (b) the fact that the Board's published rules of procedure require such consolidation; (c) the fact that denial of such consolidation would deprive Eastern of its statutory right to hearing and decision "as speedily as possible"; (d) the fact that the Board cannot perform its statutory duty of determining the "comparative public interest" without considering Eastern's application along with the like applications consolidated with Docket 2196; and (e) the fact that the Board made no findings supporting its denial of such consolidation; and

(2) Whether Eastern is entitled to judicial review now, or should be required to wait until its application has been prejudiced by delay and the grant of other applications.

Summary of Argument

Contrary to the Board's contentions, Eastern's Boston-New York/Newark application is the same as other applications in Docket 2196. Eastern is proposing exactly the same basic route, and, giving legitimate effect to the catch-all clauses of all applications, even the intermediate points proposed are identical. Eastern's application, being for a separate Boston-New York/Newark route is as much for "local" service as any other application, and more so than the lead application under Docket 2196, which expressly refuses "Feeder-Line" authorization.

Eastern's application no more affects air transportation outside the New England area than do other applications, which, if granted, would entail "through service" to and from points outside New England. Moreover, Docket 2196 includes an application by Northeast—a "trunkline" carrier even within the Board's definition—and therefore Eastern's application could not lawfully be excluded as "trunkline", even if it were such. The Board is in error in stating that applications of Northeast and Wiggins for the Boston-New York/Newark route have been dismissed, and even the one application (that of New England Central) which was dismissed, long after the Board's action on Eastern's motion for consolidation, is still significant to show that Eastern's application is within the scope of the proceeding under Docket 2196.

Contrary to the Board's contentions, Eastern's application under Docket 3501 would be foreclosed and prejudiced by the grant of the Boston-New York/Newark route to an applicant in Docket 2196. Since Eastern's application is the same, the granting of the route to another would foreclose Eastern. In the absence of a finding by the Board that Eastern's application and the applications in Docket 2196 are or are not "mutually exclusive" the Court may find—as required by the record—that the applications are "mutually exclusive", thus bringing this case squarely within the doctrine of *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327 (1945). Certainly the Court should not allow an administrative agency to exercise its power over procedure in such a manner as to foreclose substantive rights and deny the full and fair hearing required by law.

Contrary to the Board's contentions, the Board's rules of procedure and the applicable statutes require consolidation of Eastern's application with Docket 2196. The

Board unfairly charges Eastern with seeking a special advantage or a "hearing out of turn". Eastern's application was filed within the time specified by the Board's Examiner, and long before another application (that of Massachusetts Airlines) for the Boston-New York/Newark route which was consolidated with Docket 2196. Moreover, concurrent hearing of Eastern's application would not delay the hearing on Docket 2196.

Contrary to the Board's contentions, the Board has failed to make the findings required by law. The Board has made no findings, but has merely stated a conclusion. The Civil Aeronautics Act and the Administrative Procedure Act require findings which will advise Eastern of the reasons for the Board's action and which will enable the Court to ascertain whether the Board's action is based on facts, the law and sound reasoning, or on arbitrary prejudgment. Moreover, the Board is required by law to inform Eastern what "further administrative remedies or recourse" it may have (Administrative Procedure Act Section 6 (d)). This the Board erroneously failed to do.

Contrary to the Board's contentions, this Court has jurisdiction to review at this time the Board's orders denying consolidation of Eastern's application with Docket 2196. The doctrine of *Ashbacker Radio Corporation* v. *Federal Communications Commission, supra,* requires that Eastern be granted a hearing before its application is foreclosed by the granting of "mutually exclusive" applications of other parties, and Eastern cannot be relegated to a hearing which is in effect "a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application." The Board's brief does not dispute the long line of authorities cited by Eastern in its original brief and in its answer

to the motion to dismiss, which authorities hold that the denial of the right of a person to participate as an applicant or plaintiff in a proceeding involving subject matter in which such person has an interest is subject to judicial review *immediately,* and the person so excluded from such proceeding need not wait for redress until the subject matter has been disposed of ultimately on the merits. That line of authority clearly is applicable here, and requires that judicial review be granted at this time in order that Eastern's interest in the *res* of the proceeding under Docket 2196 (the Boston-New York/Newark route) shall not be foreclosed without a hearing.

ARGUMENT

I.

Contrary to the Contentions of the Board, Eastern's Right to a Hearing Would Be Effectively Denied if Its Application Were Not Consolidated With Docket 2196.

The Board's argument with respect to this point is divided into two parts, the first contending that Eastern's Boston-New York/Newark application is different from applications consolidated with Docket 2196, and the second contending that there is no certainty that the award of the Boston-New York/Newark route to another carrier in the proceeding under Docket 2196 will foreclose Eastern's application. For the most part, as will be noted hereinafter, the second contention relies upon the Board's erroneous conception that the first contention is correct—*i.e.,* that Eastern's application is different from applications consolidated in Docket 2196 and that therefore the granting of such applications would not preclude the granting of Eastern's application.

A. ***Contrary to the Contentions of the Board, Eastern's Application Under Docket 3501 Is for the Same Route Sought in Applications Consolidated with Docket 2196.***

The Board's brief seeks to confuse the issues by referring to applications, and portions of applications, consolidated with Docket 2196 on which Eastern does not rely in establishing that its application is for a route (Boston-New York/Newark) which is involved in the proceeding under Docket 2196. Thus, the Board's brief discusses (pp. 16, 18-19) applications of Island Air Ferries and Royal Air Lines, which concededly do not propose Boston-New York/Newark service. Likewise, the Board's brief discusses (pp. 16-19) irrelevant portions of applications which do propose a Boston-New York/Newark route, and the Board's maps—inserted in the back of its brief—set out portions of the applications of all parties which could have no conceivable relationship to the issues in this case.

The maps opposite page 12 of Eastern's original brief accurately set forth the *portions* of applications of other parties which are the same as Eastern's application under Docket 3501—*i.e.*, involving a Boston-New York/Newark route via intermediate points. Contrary to the Board's assertion (its brief, p. 27), Eastern did not seek to convey the impression that *only* a Boston-New York/Newark route was involved in the proceeding, as Eastern specifically stated (Eastern's brief, p. 12) that "some of the applicants have sought points and routes other than the ones shown on the maps." The purpose of Eastern's maps was to clarify the single new route proposal involved in this appeal—the Boston-New York/Newark proposal—not to confuse that issue, as the Board has sought to confuse it, with irrelevant proposals. Certainly the fact

that the proceeding under Docket 2196 involves other matters as well as the route which Eastern is proposing cannot obscure or change the fact that it does involve a Boston-New York/Newark local service route such as is proposed in Eastern's application under Docket 3501.

The Board appears to assert that, because each of the other applicants sought one or more intermediate points which Eastern did not specifically name in its application, Eastern's application is so different that it may be excluded from the consolidated proceeding (the Board's brief, pp. 16-21). Of course, if that were to be the criterion, there could be no consolidation, as all of the consolidated applications differ slightly among themselves. However, the basic Boston-New York/Newark route is the same, and the "catch-all" clauses in all applications are broad enough to include all intermediate points specified by any applicant between the two terminals. Contrary to the suggestion of the Board (its brief, p. 21) there is nothing in this Court's decision in *State Airlines* v. *Civil Aeronautics Board,* 174 F. (2d) 510 (App. D. C. 1949) to indicate that the Board could not grant to Eastern under the catch-all clause in its application any of the intermediate points proposed by other applicants between Boston and New York/Newark. This Court stated as follows with respect to catch-all clauses (174 F. (2d) 515):

> "In ruling thus, we have not said, and we do not wish to be understood as ruling, that the Board may not take advantage of a 'catch-all clause' in an application by granting routes which represent slight deviations from those proposed. For example, referring for the moment to Map No. 2, if Piedmont had applied for the routes set forth by the broken lines, the Board might well have granted authorization to provide seasonal service between New Bern and Morehead City (indicated by arrow in lower right-hand corner of the map). Simi-

> larly, the addition of the two points indicated by circled stars (London-Corbin and Middlesboro-Harlan) on the route running between Bristol and Lexington-Frankfort would seem to be an appropriate 'modification' of such proposed route."

Clearly, the addition of one or more intermediate points on the same basic route (the Boston-New York/Newark route) would not be beyond the scope of the catch-all clause of Eastern or any other applicants for that route. It follows that all applications for the Boston-New York/Newark route are identical.

The Board appears to suggest (its brief, pp. 21-22) that no applicant could receive authority to serve any point not specifically named in its application because the Examiner said in the prehearing conference report (R. 63) that "no applicant will be permitted to submit evidence concerning cities or routes not specifically mentioned in its application", although he urged (R. 63) that "All applicants who are willing to accept any routes encompassed by this proceeding should amend their applications to request such relief." If the restriction on evidence had the effect now suggested by the Board for the first time, why did the Examiner urge all applicants to include "catch-all" clauses in their applications? Clearly the purpose of such clauses was to make each applicant eligible for any authorization coming within the general scope of its application. The Board has repeatedly granted to carriers authorizations which they had not specifically sought, thus giving effect to such catch-all clauses, and the Board is in no position now to say that such clauses have no effect.

The Board seeks to dispose of some of the applications which Eastern says are the same as its application under Docket 3501 by saying that Northeast's application for a

Boston-New York/Newark route via Hartford, New Haven and Bridgeport "was in fact withdrawn" (Board's brief, p. 18), that the application of Wiggins for such a route under Docket 2572 was "dismissed" (Board's brief, p. 19), and that the application of New England Central for such route under Docket 2196 was dismissed, at the applicant's request, by order of the Board after the hearing (Board's brief, p. 18).

Unquestionably, the New England Central application has been dismissed, *after the hearing and long after the Board's orders here involved.* Certainly that application is significant in defining the issues in this proceeding, and in demonstrating that Eastern's application is within the scope of the proceeding under Docket 2196. The New England Central application was dismissed or withdrawn in the only manner which is recognized by the Board's practice,—it was *dismissed by order of the Board* at the request of the applicant (See Board's brief, pp. 50-51). Significantly, the Board did not at any point dismiss the applications of Northeast or Wiggins for a Boston-New York/Newark route, and the record shows that such applications were never dismissed or withdrawn.

With respect to Northeast, it is sufficient to note that Northeast's President testified at the hearing that "we will stand ready to do it" and "we certainly will go in there" if the Board should certificate Northeast over the Boston-New York/Newark route in question (Board's brief, pp. 48-49). Northeast never requested that the application be dismissed and the Board never took formal action to dismiss it—in contrast with the action of the Board on New England Central's application.

The Board's suggestion that Wiggins' application as a whole was dismissed is utterly without foundation, and it is amazing that the Board would advance such an argu-

ment. Wiggins' application was amended twice. Wiggins later asked the Board to dismiss Amendment No. 2 (R. 93), and the report of the prehearing conference stated (R. 82) that "Counsel for Wiggins stated that the carrier will prosecute its applications under Dockets Nos. 3004 and 2572 . . . and that it plans to amend its application under Docket 2572 . . ." Likewise, the Board treated Wiggins' application under Docket 2572 as still alive after dismissal of Amendment No. 2, stating in the order dismissing that amendment (R. 95) that "Wiggins be and it is hereby granted leave to further amend its application in said docket." Certainly, if the entire application had been "dismissed", as now asserted by the Board, it could not have been "prosecuted" or "amended", and it could not have been "reinstated" in whole or in part by a mere letter, as suggested by the Board (the Board's brief, pp. 19, 24).

It may be conceded that the applications of Northeast and Wiggins are not being fully prosecuted before the Board. But it is clear that those applications are still pending before the Board in Docket 2196 and might be granted in that proceeding, and in any case they serve to demonstrate the scope of the proceeding as including the Boston-New York/Newark route sought by Eastern.

The Board at no point in its brief disputes that the application of Massachusetts Airlines is like Eastern's, except that it specifies some different intermediate points (which are covered by Eastern's catch-all clauses), and except that the Board contends that the Massachusetts Airlines application is for a "local and feeder service" and that Eastern's is not. There is nothing in the Massachusetts Airlines application to support the theory that it is a "local and feeder" application. No restrictions of

any kind are proposed in the application. In that respect it is not different from Eastern's application which seeks authority for "unrestricted transportation" (R. 40).

The Board's suggestion (its brief, p. 25) that Eastern's application "precludes" local or feeder authorization since it requests authority to perform "unrestricted transportation" is sheerest nonsense. What possible difference could there be between an application requesting "unrestricted" authority, and an application requesting authority with no suggestion of restrictions? Plainly an application which seeks no restrictions is an application for "unrestricted" authority. Eastern and other carriers have many times sought unrestricted authority, have urgently requested—in briefs, arguments and petitions for reconsideration—that no restrictions be imposed, and yet the Board has imposed restrictions. Certainly the Board could impose restrictions on any service authorized to Eastern under Docket 3501.

Why does the Board now advance the novel theory that Eastern's request for "unrestricted" authority in some manner ties the Board's hands so that it could not give Eastern a "local and feeder" certificate?

Eastern has previously referred to its application as being for "new local service routes" (R. 72) and as a "local service proposal" (R. 74). Eastern, like other applicants, has not "objected to being included" in the proceeding (Board's brief, p. 24). Indeed, Eastern has striven more diligently than any other applicant to be included in the proceeding, even to the extent of this appeal. Thus if, as suggested by the Board (its brief, p. 24), the willingness of an applicant to have its proposal heard in the proceeding indicates that it is within the scope of the proceeding, Eastern's application clearly belongs with Docket 2196.

But the more important fact is that *no application in the proceeding under Docket 2196 sought a "local and feeder"*

certificate. New England Central—the lead applicant—specifically stated (R. 21) that it "does not wish to be known as a Feeder-Line" (a statement which the Board now says (the Board's brief, p. 25) is "difficult to interpret"—meaning, apparently, "difficult to interpret consistently with the Board's contentions". Other applicants made no reference to proposed restrictions on service, and their applications clearly are the same, from the standpoint of service proposed, as Eastern's application under Docket 3501.

It is true that counsel for Massachusetts Airlines wrote an unverified letter to the Board (Board's brief, p. 25) "to clarify" its application and in such letter stated that its application might "be construed as an application for local and feeder service". Plainly such a letter could not amend the Massachusetts Airlines application as it did not comply with any of the Board's requirements for applications or amendments to applications (the Board's Economic Regulations, Section 201).

The principal witness for Massachusetts Airlines stated very plainly at the hearing in Docket 2196 that his company is not seeking a restricted service (See Supplement A to this brief). He stated that Massachusetts Airlines is not "requesting a restriction which would require Massachusetts Airlines to make every one of the stops"—that being the typical "feeder" restriction. Moreover, he was not able to specify any proposed intermediate points between Providence and New York where the Board might require Massachusetts Airlines to stop on every flight, and he admitted that there were no intermediate stops between Providence and Boston. He further stated that Massachusetts Airlines is not asking the Board to impose any restrictions on its service, and that "we would like to have a somewhat flexible certificate". Obviously there is no

distinction between the Massachusetts Airlines application and Eastern's application.

Eastern's application under Docket 3501 is as much "local" as any application in the proceeding under Docket 2196. It is more so than the New England Central application under Docket 2196 which stated positively (R. 21) that the applicant did not "wish to be known as a Feeder-Line". Hence, any contention the Board may now make—unsupported by any *finding* of the Board—that the proceeding under Docket 2196 is a "local service proceeding" and that Eastern's application is excluded because it is a "trunkline" proposal, has no basis in the record.

Actually, there is no support for the contention that Docket 2196 is a "local" service proceeding. It includes the Boston-New York/Newark application of Northeast, which is a trunkline carrier, and it at one time included the proposal of Northeast and Wiggins under Docket 3337 (later dismissed at the request of the applicants) to segregate "local" and "trunkline" service in New England. Evidently even the Board concedes (its brief, pp. 25-26) that those proposals relate to trunkline service. Moreover, anything which Northeast proposes—and even the Board must concede that Northeast still has a new route application in the proceeding under Docket 2196—must necessarily be "trunkline" within the Board's definition, since Northeast is one of the "Sixteen major airlines" which the Board says (its brief, p. 23) "have been certificated as trunk line operators and are always referred to as such". If a "trunkline" proposal of Northeast is in the proceeding—and it obviously is—how can the Board now say that Eastern's application was excluded because it proposes "trunkline" service?

The Board now suggests—though it did not so find in excluding Eastern's application—that Eastern's applica-

tion is not within the scope of Docket 2196 because it would affect service outside the New England area. The Board now says (its brief, p. 22) that the granting of the Boston-New York/Newark route to one of the applicants in Docket 2196 "could not have resulted in additional service outside the New England area, as is true in the case of Eastern, because none of the applicants operate south of New York as Eastern does". A more evasive statement could hardly be imagined. Of course it is true that "none of the applicants operate south of New York", but Northeast operates "outside the New England area"—to Canada (see map opposite page 14 of Eastern's previous brief). In view of that fact, how could the Board contend that Eastern's application could be excluded and Northeast's included with Docket 2196?

Moreover, the Board has no answer to Eastern's contention in its original brief (p. 15) that *any* Boston-New York/Newark route involves "through service" to and from points south of New York because of the requirements of Sections 404 (a) and 1002 (i) of the Civil Aeronautics Act, which obligate all carriers to provide "through service" in connection with each other. The Board's only attempt to answer that contention (its brief, pp. 22-23) is the assertion that if another carrier operated the Boston-New York/Newark route "no new non-stop service from New England to points south of New York" would result, and "the carriage south of New York would only involve existing services rather than new services". The Board overlooks the fact that if *Eastern* operated the Boston-New York/Newark route as a *separate route*—and Eastern has applied for the authority in that form (R. 40)—there would be "no new non-stop service from New England to points south of New York", and "the carriage south of New York would only involve existing services".

Plainly there is no distinction between Eastern's application and the other applications insofar as effect on services outside the New England area is concerned.

The Board's brief seeks further to confuse the issue by the repeated assertion that the Board "had repeatedly and recently considered Eastern's proposal" (the Board's brief, p. 26; see also pp. 3, 4, 7 *et passim*). Obviously, even if the Board had previously given Eastern a hearing on the same proposal which is here involved, that would not excuse arbitrary exclusion of Eastern's application under Docket 3501. As the Board pointed out (its brief, p. 35), citing the authority of this Court in *State Airlines* v. *Civil Aeronautics Board, supra,* "an administrative agency is not bound by its own prior determinations". The Board made no finding that Eastern's application should be excluded on such a ground. On the contrary, it denied the motion of the carrier which had urged that ground for exclusion of Eastern's application (R. 95).

The fact is that Eastern has never had a full hearing on its request for unrestricted authorization on the Boston-New York/Newark route. As was pointed out to the Board in Rhode Island's motion for consolidation (R. 90-91):

> "Actually, there has thus far been no adequate hearing on Eastern's request for removal of the restriction on its Providence services. At the time of the original Eastern authorization to serve Providence there was of course no evidence as to the effect such a restriction would have on the carriers involved or on the travelling public. Also, when the record was made in the *Middle Atlantic Area* proceeding, Eastern had not been certificated to serve Providence and there were no operating statistics which would show the effect of the restriction. Yet this is the only proceeding in which the Board has had an opportunity to consider the restriction on Eastern's service to New England cities. Today there is ample evidence that the restriction is a great and

> unjustifiable burden on the travelling public, and results in unnecessary expense to Eastern and the public. That evidence should be heard in this proceeding."

It should be clear from the foregoing that the Board's brief misrepresents the facts concerning Eastern's previous efforts to provide local service on the Boston-New York/Newark route. After the earlier proceeding in which Eastern obtained the restricted Boston-New York/Newark route, Eastern had a hearing in only one proceeding—the *Middle Atlantic Area* case—on a proposal to remove the restriction, and in that case there was no evidence available as to the effects of the restriction on the intermediate cities Providence, Hartford and New Haven. Moreover, the hearing in that case was held during the first three months of 1946—over three years before the hearing in Docket 2196. Certainly no one can fairly say that Eastern should be prevented from having a hearing on its New England local service proposal three years after the last hearing, particularly when the previous hearing was entirely inadequate to show the real need for Eastern's presently proposed service.

The Board's brief (pp. 24-25) misrepresents Eastern as having "long recognized that its proposal does not belong in Docket 2196" because Eastern originally intervened in Docket 2196 but indicated that it did not intend to file an application (R. 53). As the Board well knows, Eastern's application in the *Middle Atlantic* case was then pending, and in view of the possibility that the restriction would be removed in that proceeding, Eastern obviously could not file a new application. After Eastern's application in that case was denied—on the basis of the inadequate record in that case—and when the Board reopened the proceeding under Docket 2196 to consider new local service applica-

tions in the Boston-New York/Newark area, Eastern filed its application herein. Eastern at no time suggested in any way that its proposal for such services was not within the scope of the proceeding under Docket 2196.

Eastern's application under Docket 3501 is the same as applications consolidated with Docket 2196 and the Board plainly erred in refusing to consolidate Eastern's application with that proceeding.

B. ***Contrary to the Board's Contentions, Eastern's Application Under Docket 3501 Would Be Prejudiced and Foreclosed by the Grant of the Boston-New York/Newark Route to Any Applicant in Docket 2196.***

In seeking to meet Eastern's contentions headon, the Board could be expected to argue that, even though Eastern's application under Docket 3501 is the same as applications consolidated with Docket 2196, the grant of one or more of the latter applications would not prejudice or preclude the granting of Eastern's application in a later proceeding. The Board makes no such argument. Instead, the Board evasively says that, because (as it erroneously asserts) Eastern's application is different from the applications consolidated with Docket 2196 it would not be foreclosed by the granting of such other applications.

As demonstrated above, Eastern's application is the same as others considered in Docket 2196. That being true, the Board has totally failed to meet Eastern's contention with regard to the prejudice which would arise from the granting of applications in Docket 2196.

The Board seeks to distinguish the case of *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945) from this case on the ground that in the *Ashbacker* case the *administrative agency* had found

that the applications in question were "mutually exclusive", whereas here any such finding must be made by the *Court* from the evidence of record. That is not a significant distinction, since the evidence of record clearly shows that the applications are mutually exclusive—there being five applicants for the same authority (Boston-New York/Newark via intermediate points), and there also being evidence that the Board has in a previous hearing refused to give Eastern local service authority on that route because of the existence of two carriers providing local service there, thus emphasizing the certainty that the Board would not grant Eastern's application under Docket 3501 in a later proceeding after granting one of the applications in Docket 2196.

It can make no difference whether it be the Board or the Court that makes the finding that the applications are "mutually exclusive". Once the Court makes that finding, this case is in exactly the same situation as the *Ashbacker* case.

The Board's failure to make such a finding—or to find to the contrary—serves, however, to highlight the inadequacy of the findings of the Board in this case. It seems obvious that if the Board refuses consolidation of an application offered for inclusion in a proceeding, it should make a *minimum* finding that such application proposes different service from those applications which are included, that it and such other applications are not "mutually exclusive", and that it will not be prejudiced by the granting of any of such other applications.

No lesser findings could possibly meet the Board's statutory obligation to support its orders by findings, and inform the applicant as to why his proposal was excluded.

The Board seeks also to distinguish the *Ashbacker* case (Board's brief, p. 32) by saying that "in the *Ashbacker*

case, Ashbacker was required not only to convince the Commission that it should have a license, but also that Fetzer's license should be withdrawn." The Board fails to note that the case here presented is much harsher than the *Ashbacker* case, as the Board has no power—comparable with the power of the Federal Communications Commission—to withdraw a certificate authorization lawfully granted and exercised, and therefore Eastern would be faced with an absolutely impossible task in seeking authorization after the Boston-New York/Newark route had been granted to another applicant.

The Board argues (its brief, p. 26) for a "free exercise of discretion in determining whether applications are to be consolidated for purposes of hearing and decision." The difficulty with such argument is that, by a capricious selection of standards for inclusion or exclusion of applications, the Board can, intentionally or otherwise, deprive a deserving applicant of a hearing, granting the route in question to another applicant, and leaving the former applicant with nothing but an empty "hearing" and the sad announcement: "Sorry, the route has just been given away to someone else." That is what seems to be happening thus far in this case and Eastern respectfully urges that the Board's action be set aside by this Court.

II.

Contrary to the Board's Contentions, the Board's Rules of Procedure and the Provisions of Applicable Statutes Require Consolidation of Eastern's Application With Docket 2196.

Eastern believes that the legal arguments presented in Part III of the Board's brief are fully met in Eastern's original brief, and therefore this brief will not burden the Court with further discussion of those points.

However, Eastern must take vigorous exception to the Board's suggestions (its brief, pp. 36-38) that Eastern is making a "brazen" and "thinly-veiled attempt to secure a hearing on its application out of turn", and to bring in "extraneous issues", and is seeking to compel the Board to give "shabby treatment" to others in order to obtain an "unjustified benefit". Such suggestions hardly comport with the dignity of the Board, and they certainly are not merited on the basis of the record.

Eastern is not seeking a hearing "out of turn". Eastern's application was filed within the time set by the Board's Examiner (R. 88), as the Board itself recognizes (its brief, p. 4). The Board unhesitatingly consolidated with the proceeding under Docket 2196 the application of Massachusetts Airlines, which was filed over three months after Eastern's application and over three months after the deadline set by the Examiner. Certainly if anyone sought a hearing "out of turn" it was not Eastern.

Eastern has always believed, and now firmly believes, that its application under Docket 3501 is within the scope of the proceeding under Docket 2196, and that it is entitled to hearing along with like applications consolidated with that proceeding. Eastern further believes that hearing on

its application would not add perceptibly to the time required for hearing on that proceeding, and would not result in "shabby treatment" for anyone. On the contrary, Eastern believes that the Board could not perform its duties properly in the public interest—which is the primary interest to be considered—except by comparing Eastern's Boston-New York/Newark proposal with the like proposals in Docket 2196 and determining, after such comparison, which is best suited to meet the public need.

III.

Contrary to the Board's Contentions, the Board Has Failed to Make Any of the Findings Required by Law With Respect to Eastern's Request for Consolidation.

The basic weakness in the Board's defense of its lack of findings is apparent in the fact that its discussion on this point is almost entirely in the form of an apology. The Board starts off by suggesting (its brief, p. 39) that Congress did not mean "every order" when it said (Section 1005 (f) of the Civil Aeronautics Act) that "every order" of the Board must be supported by findings of fact.

The Board's primary basis for contending that Congress did not mean what it said in plain English is that "we do not think this provision is applicable to interlocutory, procedural orders such as those under consideration," because, apparently, such orders allegedly "are not reviewable". Such an argument hardly merits an answer. In the first place, the Board's orders denying consolidation do not become "interlocutory, procedural" just because the Board's brief repeatedly so refers to them. This Court has *denied* the Board's motion to dismiss, and therefore indicated at least a tentative conclusion that the orders may not be

"interlocutory, procedural", and may be subject to review.

Even the Board has never before suggested that "the orders in question are not reviewable" (its brief, p. 39, footnote) *at any time.* The Board previously has asserted (see its motion to dismiss) simply that Eastern must wait until final decision by the Board on the applications in Docket 2196 before appealing. Can it be that the Board now thinks itself completely immune from review of procedural matters? Such certainly is not the law, and Eastern submits that Congress meant exactly what it said when it required that "Every order of the Board shall set forth the findings of fact upon which it is based" (Section 1005(f) of the Civil Aeronautics Act).

The Board also asserts (its brief, p. 40) that Eastern's motion for consolidation was "merely" a "request" within the meaning of Section 6 (d) of the Administrative Procedure Act, and therefore can be brushed off with a "simple statement of the procedural or other grounds," and need not be disposed of with "findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record", as required by Section 8 (b) of the Administrative Procedure Act. The difficulty with such an argument is that, if the Board's reasoning were correct, the Board could simply brush off an "application" in the same manner, since Section 6 (d) applies equally to "any written application, petition, or other request." Certainly Congress did not intend to allow the Board to deal cavalierly with applications, or with such motions as those here involved.

But even if the Board's interpretation of Section 6 (d) of the Administrative Procedure Act were correct, the Board's orders herein do not comply with its requirements. There is nothing in the Board's orders to show the grounds on which the Board acted.

A significant deficiency in the Board's orders here involved is the failure of the Board to indicate to Eastern either the reasons why its application was not included in the proceeding under Docket 2196 or what further steps Eastern might take in order to have its application so consolidated. Both the Senate and House Committees reporting on the Administrative Procedure Act stated that Section 6 (d) would require the administrative agency to "apprise the party of the basis of the denial and any other or further administrative remedies or recourse he may have" (Senate Document 248, 79th Congress, 2nd Session (1946), pp. 206, 265). It may well be that, if the Board had told Eastern why its request for consolidation was denied and what steps Eastern could take to obtain consolidation, Eastern would have been able to amend its application in such manner as to obtain consolidation. Thus, even if Section 6 (d) of the Administrative Procedure Act is regarded as being less strict than Section 8 (b), the Board wholly failed to meet the requirements of the Administrative Procedure Act as set out in Section 6 (d).

The suggestion in the Board's brief (p. 40) that the orders denying consolidation were "self-explanatory . . . in the light of what had gone before" is plainly unsound. The Board says (its brief, p. 41) that Eastern should have known why its request was denied because the Examiner said in the prehearing conference report that "he was unable to see any relation between the proceeding as it now stands and Eastern's proposal, and that in his opinion the Eastern proposal would enlarge the scope of the proceeding" (R. 84). That statement of the Examiner is no more enlightening than the Board's cryptic statement that Eastern's application "would unduly expand the issues and broaden the scope of the proceeding" (R. 94). It suggests no basis whatsoever for the ruling of the Board. The Board

also says (its brief, pp. 41-42) that Eastern should have known the basis of the Board's action from the motion filed by American Airlines requesting the Board to dismiss Eastern's motion for consolidation. However, the Board's action on American's motion is as mysterious as its other actions in this respect, for the Board merely ruled (R. 95) that "the aforementioned motion of American, except to the extent it is granted herein, be and it is hereby denied."

If the Board had granted American's motion, Eastern still would not know on what ground, but it might guess that it was on one of the grounds mentioned in the motion. But when the Board denied that motion, "except to the extent it is granted herein", Eastern is left as much in the dark as it was by the Board's own meaningless "finding". Eastern and Rhode Island presented in their motions many reasons why consolidation should be granted. The Board answered none of those arguments and there is nothing in the record to suggest why the Board refused consolidation.

The Board has totally failed to make findings as required by law. Eastern submits that the least the Court could do with respect to this case would be to remand it to the Board for findings as to whether Eastern's application under Docket 3501 and the applications included in Docket 2196 are "mutually exclusive"; if not, why not; whether the prior granting of one or more of the applications in Docket 2196 would prejudice Eastern's application or make Eastern's burden in obtaining the desired certification any more difficult; and what action Eastern might take with respect to its application in order to obtain consolidation thereof with Docket 2196.

IV.

Contrary to the Board's Contentions, This Court Has Jurisdiction to Review at This Time the Board's Orders Denying Consolidation.

The Board's brief (pp. 11-13) reiterates its contentions that this Court has no jurisdiction to review the Board's orders at this time and that Eastern must wait at least until final action on the applications in Docket 2196 before seeking review. The difficulty with the Board's argument is that it flies in the face of *Ashbacker Radio Corporation* v. *Federal Communications Commission, supra,* where the Court specifically held that an applicant should not be forced, in its first hearing on its application, to convince the administrative agency that the franchise previously given to another applicant should be withdrawn. As the Court said (326 U. S. 331): "To place that burden on it is in effect to make its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That might satisfy the strict letter of the law but certainly not its spirit or intent."

Likewise, in this case, the Board may not lawfully compel Eastern to wait until the Boston-New York/Newark route has been granted to someone else, then seek judicial review and, many months later, go into a hearing where Eastern must prove that a service long since certificated and placed in operation at great expense should be set aside in order that Eastern may be certificated.

The cases cited by the Board do not support the Board's conclusion that Eastern's remedy must be postponed and, in effect, destroyed. In *Mansfield Journal Company* v. *Federal Communications Commission,* 173 F. (2d) 646 (App. D. C. 1949) it appeared that there were three applicants for

three licenses, and the Court found (173 F. (2d) 647) that the grant of one application "did not in the slightest diminish the appellant's chance of success". Certainly that case is no authority for the Board's proposition that no review can be had where the Board grants hearing on *five applications* for a *single route* and denies concurrent hearing to another applicant for the same route.

Of course it is true that in the *Ashbacker* case, and in other cases referred to by the Board, review was not sought until final action by the administrative agency on the merits. However, that does not mean, or even suggest, that review would not have been available at an earlier stage if the person aggrieved had sought it. Eastern's answer to the Board's motion to dismiss, and Eastern's original brief, have cited numerous cases in which the courts have held —without dissent—that review is available *immediately* in judicial proceedings where one having an interest in the subject matter of the proceeding is denied the right to participate, to show fully his interest, and to obtain the relief requested. The Board has not disputed any of those authorities, or the invariable principle established by them.

Evidently the Board asserts that precedents in judicial proceedings have no bearing on administrative proceedings, and that an administrative agency is bound by less stringent rules of due process than courts. That is not true. Administrative agencies have no more power to destroy rights than have courts. The *availability* of judicial review in administrative proceedings of this type is the same as in court proceedings, even though the *scope* of review in the former may be somewhat limited. As Mr. Justice Frankfurter stated in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131 (1939), "Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agen-

cies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play."

Here, as demonstrated above, Eastern plainly has a great interest in the subject matter of Docket 2196, as Eastern is seeking the same Boston-New York/Newark route which is under consideration in that proceeding. As Eastern has been denied the right to participate as an applicant in that case, Eastern clearly is entitled to judicial review at this time, under the authority of *Gaines* v. *Clark,* 51 App. D. C. 71, 275 Fed. 1017 (1921); *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio Railroad,* 331 U. S. 519 (1947), and the many other cases cited in Eastern's answer to the motion to dismiss and Eastern's original brief.

CONCLUSION

In conclusion, therefore, it is respectfully submitted that the Board's orders discussed herein should be set aside to the extent that they deny the motions of Eastern and of Rhode Island for consolidation for hearing and decision in the proceeding under Docket 2196 of Eastern's application under Docket 3501.

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
825 Citizens & Southern National
Bank Building
Atlanta, Georgia

LLEWELLYN C. THOMAS,
Hibbs Building
Washington, D. C.

Attorneys for Eastern Air Lines, Inc.

GAMBRELL, HARLAN & BARWICK
825 Citizens & Southern
National Bank Building
Atlanta, Georgia
of Counsel

October 3, 1949

Certificate of Service

I hereby certify that on the 3rd day of October, 1949, I have mailed copies of the foregoing reply brief, postage prepaid, to Edward Dumbauld and William D. McFarlane, Special Assistants to the Attorney General, Department of Justice, Washington, D. C., Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington, D. C., and Philip Schleit, Attorney for the State of Rhode Island, 1346 Connecticut Avenue, N. W., Washington, D. C.

W. Glen Harlan

SUPPLEMENT A

Excerpt From Transcript of Proceedings Before an Examiner of the Civil Aeronautics Board March 30, 1949, in the *Additional Service in New England States* case, Docket 2196 *et al.*, Vol. 3, pp. 458-460; Testimony of Mr. Given Brewer, Manager of Massachusetts Airlines:

By Mr. Harlan:

Q. Do I understand you are applying and requesting a restriction which would require Massachusetts Airlines to make every one of the stops.

A. That we are applying for a restriction that insures that we make every stop?

Q. Yes.

A. No.

Q. Do you anticipate that the Board will impose such a restriction? Is that part of your plans, that you will make every stop?

A. No, we would like to have a somewhat flexible certificate.

Q. By "somewhat flexible," what do you mean?

A. We are willing to be tied down by whatever stops or intermediate stops the Board feels is necessary to prevent us from being a trunk carrier, but we would not want to have—if there are five stops, let us say, between two points, if there were no passengers, no mail or anything, we would rather skip that stop, and we might want to change our terminal points with the seasonal variations in traffic, but we are willing to take a restriction that will prevent us from being a trunk carrier between terminal points, and we think a reasonable restriction would be two intermediate stops.

Q. You mean two intermediate stops between any two trunkline points?

A. Yes.

Q. Then let us look back—

Examiner Stodola: Is it between two trunkline points or terminal points?

The Witness: Terminal points, I am sorry.

By Mr. Harlan:

Q. What are terminal points. Let us look at your map on exhibit MA 200. What are terminal points on that?

A. Well, the thing I was thinking of in particular would be from Fall River, New Bedford to New York. Now, here we have 1, 2, 3, 4 intermediate stops. We feel if we were restricted to two intermediate stops it would keep us from competing with being a trunk carrier, and it would not be too heavy a restriction. That would allow us to skip stop two of these proposed places enroute.

By Mr. Harlan:

Q. Between Providence and New York, what two intermediate stops would you want required?

A. Want required?

Q. Yes.

A. That would be a matter for the Board to decide.

Q. Well, what two would you suggest?

A. That we be compelled to stop at?

Q. Right.

A. I could not answer that question.

Q. Between Providence and Boston, what two would you suggest?

A. There are no intermediate stops there. I do not consider that distance is sufficiently long to be considered a trunk operation.

Q. The same is true then between Boston and Fall River-New Bedford?

A. That is right.

Q. Are you asking the Board to impose such a restriction as that?

A. Not to my knowledge.

Mr. Harlan: That is all.

BRIEF FOR INTERVENOR, STATE OF RHODE ISLAND

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 10099

EASTERN AIR LINES, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

Petition for Review of Orders of the Civil Aeronautics Board.

PHILIP SHARP,
1346 Connecticut Ave. N.W.,
Washington 6, D. C.

ALBERT E. MARSH,
1606 Industrial Trust Building,
Providence 3, Rhode Island,

Attorneys for Rhode Island Port and Industrial Development Commission, representing the State of Rhode Island.

April 6, 1949.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 10099.

EASTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

Petition for Review of Orders of the Civil Aeronautics Board.

BRIEF FOR INTERVENOR, STATE OF RHODE ISLAND.

JURISDICTIONAL STATEMENT.

In this case the Petitioner, Eastern Air Lines, Inc. (hereinafter referred to as "Eastern") has asked that certain orders of the Respondent, Civil Aeronautics Board (hereinafter referred to as "the Board"), made in the proceeding, entitled *Service in New England States Case,* Docket 2196 *et al.,* be reviewed and set aside as contrary to law.

This brief is submitted in behalf of the State of Rhode Island, an intervenor herein, by the Rhode Island Port and Industrial Development Commission.

The proceeding before the Board in Docket 2196 *et al.* involved applications for certificates of public convenience

and necessity for authority to operate interstate air transportation and the joint application (since dismissed at the request of the applicants) of two holders of such certificates for approval of an agreement whereby portions of one carrier's routes and part of its equipment would be transferred to the other (App. 31-32, 70, 93-95).* The Board's jurisdiction was based on Sections 401, 408 and 412 of the Civil Aeronautics Act of 1938, as amended, 49 U. S. C. §§481, 488, 492.

Most of the applications to be heard in Docket 2196 *et al.* involved air service to and from Providence, Rhode Island (App. 22-23, 24-25, 32-34, 35-37, 44, 45, 50). The State of Rhode Island is vitally interested in obtaining adequate and sound air transportation service for Providence, its capital city and principal commercial and industrial center.

The State of Rhode Island also owns and operates the Theodore Francis Green Airport, through which Providence and the adjacent area receive air transportation service, and has an investment of several million dollars in this airport. The Rhode Island Port and Industrial Development Commission, an agency of the State of Rhode Island, has the statutory duty of representing the State of Rhode Island and its municipalities in all proceedings having to do with air transportation.

In accordance with the provisions of Section 285.6 (b) of the Board's Economic Regulations, the State of Rhode Island satisfied the Board that it had a "property or financial interest which may not be adequately represented by existing parties" and was permitted to intervene in the proceeding in Docket 2196 *et al.* (App. 68-69). Being a party to the proceeding before the Board and having a real and substantial interest in the air service authorized for Providence, its capital and principal city, Rhode Island is entitled to be an intervenor here.

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* The joint appendix will be so cited herein.

STATEMENT OF THE CASE.

The proceeding in Docket 2196 *et al., Service in New England States Case,* resulted from the consolidation by the Board on August 24, 1948 of the proceeding, *Additional Service in New England States Case,* Docket 2196 *et al.,* which included applications for authority to operate new air routes in the New England area, with Docket 3337, a joint application (since dismissed at the request of the applicants) of Northeast Airlines, Inc. and E. W. Wiggins Airways, Inc. for approval of a route transfer agreement (App. 31-39, 70-71, 93-95).

The scope of the *Additional Service in New England States Case,* Docket 2196 *et al.* (earlier the lead docket number was 1279), according to the examiner's Report of Prehearing Conference Held October 21, 1947, was limited as follows (App. 55):

> "The examiner announced that this proceeding would be limited to applications seeking authority to provide new or additional service in the New England States. It was also announced that applications requesting routes outside of this general area would not be recommended for consolidation in this proceeding unless the service proposed was incidental to service in New England and in a region reasonably adjacent to cities in the New England States."

The consolidated proceeding *Service in New England States Case,* Docket 2196 *et al.,* is at least as broad in scope as one of its parts, the *Additional Service in New England States Case,* and involves new and additional service in the New England area, including service outside such area which is incidental to service within the area.

After the prehearing conference in *Service in New England States Case,* Docket 2196 *et al.,* and within the time set by the examiner for filing applications to be heard in the proceeding, Eastern filed its application under Docket 3501 for authority to provide new local service

between the cities of Providence, Hartford, Conn., New Haven, Conn. and Boston, Mass. or, in the alternative, for removal of the restrictions on its existing service to those cities (App. 39). Eastern immediately moved for consolidation of its application under Docket 3501, in the Docket 2196 *et al.* proceeding (App. 71) and later the State of Rhode Island made a similar motion (App. 89). By its Order Serial No. E-2201, November 17, 1948, the Board denied Eastern's motion for consolidation (App. 92) and by its Order Serial No. E-2308, December 21, 1948, denied the State of Rhode Island's similar motion (App. 96). These are the two orders of the Board which have been brought here for review, and the State of Rhode Island joins Eastern in asking that they be set aside.

Providence at the present time is served by Eastern, American Airlines, Inc. and Northeast Airlines, Inc. pursuant to certificates of public convenience and necessity issued by the Board (App. 89). However, Northeast has either been unwilling or unable to provide more than one schedule per day, and Eastern's authorizations from the Board have been so restricted by the Board that Eastern can not legally provide the local air service required by Providence (*New England Case,* 7 C. A. B. 27, 439, 447, 448 (1946); App. 4, 89).

Providence at present is served by Eastern on its Routes 5 and 6. Eastern's Route 5 extends from Brownsville and San Antonio, Tex. to New York City via various intermediate points, including Richmond, Va., Washington, D. C. and Newark, N. J., and from New York City to Boston, Mass. via New Haven, Conn., Providence and Hartford, Conn. (*New England Case, supra,* 447; App. 4, 39, 72). Eastern's Route 6 extends from Miami, Fla. to New York City via intermediate points, including Richmond, Va., Washington, D. C. and Newark, N. J. and from New York City to Boston via New Haven, Providence and Hartford (*New England Case, supra,* 448; App. 4, 39, 72).

Eastern's certificates for Routes 5 and 6, however, contain restrictions which permit Eastern to serve Providence only on flights originating at Boston and terminating south of Richmond, Va. or west of Charleston, W. Va. or on flights terminating at Boston and originating south of Richmond or west of Charleston, W. Va. (*New England Case,* 7 C. A. B. 27, 439, 447, 449 (1946); App. 4, 72). These restrictions were designed for the purpose of, and have been effective in, preventing Eastern from rendering local air service to and from Providence within the New England area (*New England Case, supra,* 36, 440, 441; *Additional Service to Boston,* 4 C. A. B. 686, 695 (1944); App. 76-77).

The effect of these restrictions is to prevent Eastern from rendering, and to deprive the people of Providence of, air service originating or terminating in Providence, air service suited to the convenience of persons traveling between Providence and nearby cities such as Boston, Hartford, New Haven, New York City and Newark, and air service which is required for persons traveling between Providence and the aforesaid nearby cities but which is not needed and cannot be supported by the traffic between Providence and such distant cities as Atlanta, Miami, New Orleans and Houston.

Eastern's application under Docket 3501 asks for the removal of all existing restrictions on Eastern's Route 5 and Route 6 operations and service to and from Boston, Providence, Hartford and New Haven and also for new and additional authorizations, either as amendments to its existing Routes 5 and 6 or as new and separate routes, between New York/Newark, New Haven, Hartford, Providence and Boston (App. 40). Eastern's application under Docket 3501, if granted by the Board, would permit Eastern to serve fully the air transportation needs of the State of Rhode Island and Providence, and the State of Rhode Island will support that application before the Board.

Part (then designated "*Additional Service in New England States Case,* Docket 1279 *et al.*") of the present

proceeding, *Service in New England States Case,* Docket 2196 *et al.,* was established to hear applications "seeking authority to provide new or additional service in the New England States," including applications for service outside the new England area "incidental to service in New England and in a region reasonably adjacent to cities in the New England States" (App. 55). Although Eastern's application under Docket 3501 would clearly appear to be within the scope of the proceeding in Docket 2196 *et al.,* the Board denied it consolidation on the sole ground that consolidation "would unduly expand the issues and broaden the scope of" the proceeding (App. 94, 96).

Eastern's application for the removal of the restrictions on its Route 5 and Route 6 service in effect amounts only to a request to be permitted to provide local air transportation service in relation to the cities of Providence, New Haven, Hartford and Boston, for Eastern is now authorized to provide unrestricted air transportation service between points south of Richmond and west of Charleston, W. Va., on the one hand and Providence, New Haven, Hartford and Boston on the other, except that such flights must originate or terminate in Boston (*New England Case,* 7 C. A. B. 27, 439, 447, 449 (1946)).

Moreover, Eastern's application under Docket 3501 specifically requests new and additional authorizations between New York, Newark, New Haven, Hartford, Providence and Boston permitting it to render unrestricted local service (App. 40). Thus, Eastern's application under Docket 3501 principally involves only local service within the New England area.

Although it has refused to consolidate Eastern's application under Docket 3501, the Board has consolidated the applications of six other applicants to provide local service within the same area, most of whom seek authority to provide transportation between the same points involved in Eastern's application under Docket 3501 (App. 69, 95).

The applications of others which have been consolidated by the Board in Docket 2196 *et al.* ask authority to pro-

vide air service between the following points which Eastern seeks to serve under Docket 3501:

New England Central Airways System, Inc., Docket 2196: Application for authority to provide air service between Boston and Hartford (App. 19); between Boston, Bridgeport, and New York (App. 22); between Bridgeport and Hartford (App. 22); between Boston and New Bedford and New Bedford and Providence (App. 22, 23).

Putnam Airlines, Docket 2757: Application for authority to provide air service between Boston, Providence, New Haven, Putnam and New York (App. 23, 24); between Providence, Putnam and Hartford (App. 24, 25).

Northeast Airlines, Inc., Docket 3182: Application for authority to provide air service to and from New Haven, and Hartford on its existing route between New York, Boston and Caribou, Maine (App. 28).

E. W. Wiggins Airways, Inc., Docket 2572: Application for authority to provide air service between New York, New Haven and Hartford (App. 44); between Boston, Providence and Hartford (App. 44, 45, 50); between New York/Newark, New Haven, Hartford, Providence and Boston (App. 45, 46).

Northeast Airlines, Inc. and E. W. Wiggins Airways, Inc., Docket 3337 (since dismissed at the request of the applicants): Joint application for approval of an agreement providing for the transfer of certain portions of Northeast's routes to Wiggins whereby Northeast would abandon air service at Hartford and New Haven and Wiggins would provide air service between New York/Newark, New Haven and Hartford and between New York/Newark, New Haven, Providence and Boston (App. 32-34, 35-37).

Island Air Ferries, Inc., Docket 3518: Application for authority to provide air service between New York and New Haven (App. 41).

STATUTES INVOLVED.

The following quoted portions of statutes are involved in this case:

ADMINISTRATIVE PROCEDURE ACT, 5 U. S. C. §1001 *et seq.*

Sec. 2. As used in this Act—

(a) *Agency.*—"Agency" means each board (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

* * * * *

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * * *

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

CIVIL AERONAUTICS ACT OF 1938, 49 U. S. C. §401 *et seq.*

Sec. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and

shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Sec. 404 (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air

transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

* * * * *

Sec. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the court; and the Board shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

(d) Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Board.

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged

before the Board, or if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

ARGUMENT.

I.

The Denial of the Motions to Consolidate the Application of Eastern in the Proceeding, Docket 2196 et al., Was Arbitrary and Capricious and Contrary to the Administrative Procedure Act.

Section 10(e) of the Administrative Procedure Act, 5 U. S. C. §1009, provides that on review this Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion . . ."

Certainly, the Board's action in denying consolidation of Eastern's application to provide local service to and from Providence, Boston, New Haven and Hartford, while at the same time consolidating the applications of others involving service to and from the same points, is on its face arbitrary and capricious. The Board's sole stated reason for denying the consolidation of Eastern's application is that such consolidation "would unduly expand the issues and broaden the scope" of the proceeding (App. 94, 96).

Undoubtedly the consolidation of any application would expand the issues and broaden the scope of the proceeding somewhat simply because the issue of the fitness, willingness and ability of the applicant would necessarily be new to the proceeding. Also, where the applicant requesting consolidation operates an existing service, the service to and from the cities applied for may have some aspects dif-

ferent from other services proposed for the same cities because of the fact that the applicant could render service between the cities applied for on the one hand and the cities already served on the other.

However, the orders complained of here could not properly be based on anything less than *undue* expansion of the issues or *undue* broadening of the scope of the proceeding, for otherwise consolidated proceedings could never be established. Every different application consolidated necessarily introduces some new issues.

As previously shown, other applications now in the proceeding in Docket 2196 *et al.* propose service between New York/Newark, New Haven, Providence, Hartford and Boston—exactly the same points and same service proposed by Eastern in Docket 3501. It is true that Eastern's existing routes extend south of New York/Newark, but the service of Northeast Airlines, Inc., whose applications under Dockets 3182 and 3337 have been consolidated in Docket 2196 *et al.*, also extends beyond New England to Montreal, Canada.

Eastern already has authority to provide unrestricted service between Providence, New Haven, Hartford and Boston on the one hand and points on its system south of Richmond and west of Charleston, W. Va., except that such flights must terminate or originate in Boston (*New England Case*, 7 C. A. B. 27, 439, 447, 448 (1946)). Eastern's application under Docket 3501, therefore, actually is one principally for local service within New England, and certainly the service involved outside New England is no more than incidental to that to be provided within New England and within the limitation originally set by the examiner (App. 54, 55). Moreover, the applications of Northeast Airlines, Inc. under Dockets 3182 and 3337 have been consolidated by the Board, although they incidentally involve service to and from Montreal.

Manifestly, the consolidation of Eastern's application in the proceeding under Docket 2196 *et al.* would no more expand the issues or broaden the scope of the proceeding

than did the consolidation of the other applications, particularly those of Northeast Airlines, Inc. Moreover, it would appear arbitrary and capricious to deny an applicant a hearing for the sole reason that such applicant's route system is such that inherently his application involves some different issues than those involved in the applications of others. If Eastern is to be denied a hearing on its application now simply because its route system extends south of New York/Newark, something which would be inherent in any application by Eastern, then an arbitrary and capricious distinction has been established which this Court should strike down.

No attempt has been made by the Board, and indeed none could be made, to say that the present proceeding involves only applications for feederline services. New England Central Airways System, Inc., whose application under Docket 2196 is the lead docket in the proceeding, has specifically stated in its application that it does not desire a feederline certificate (App. 21).

Also, Northeast Airlines, Inc., under its Docket 3337 (consolidated at one time in Docket 2196 *et al.* but now dismissed at the request of the applicants), specifically asked the Board to authorize certain changes in its route structure in order that it might have only a trunkline operation as shown by the following quotation (App. 32):

> "In an effort to achieve a New England air transportation service pattern conforming generally to the pattern hereinbefore in paragraph 6 hereof described, Northeast and Wiggins have entered into an agreement (hereinafter called the Agreement) (which is, and is stated to be, subject to the approval of this Board) which, in substance, provides for the transfer by Northeast to Wiggins, and the acquisition by Wiggins from Northeast, of Northeast's authority, pursuant to its certificate from route No. 27, to perform those air transportation services over said route which may properly be deemed local or feederline services, and the retention by Northeast of its authority, pursuant to its certificate for said route, to perform those air

> transportation services over said route which may, more properly, be deemed to be regional trunkline services."

Nor could the Board have made any distinction based upon Eastern's request for the removal of the restrictions on its Routes 5 and 6 services. Northeast Airlines, Inc. under Docket 3337 (consolidated at one time in Docket 2196 *et al.* but now dismissed at the request of these applicants) asked for a complete modification of its certificate (App. 31-39). Also, E. W. Wiggins Airways, Inc., under its Docket 2572 (now consolidated in Docket 2196 *et al.*), has requested several modifications of restrictions in its present route certificate (App. 50, 58).

As a practical matter, the issues would not be expanded at all by the consolidation of Eastern's application. In submitting evidence showing the need for service between the New England Cities and New York/Newark, it is obvious that all of the applicants will include evidence of traffic which would continue beyond New York/Newark to the south. The Board would not and could not prohibit the introduction of such evidence, because clearly any carrier receiving a certificate would carry such traffic. Indeed, under Section 404 (a) of the Civil Aeronautics Act of 1938, as amended, 49 U. S. C. §484 (a), the carrier would be obligated to provide just and reasonable through service, and just and reasonable joint rates for the through service.

The Board itself has recognized that the only fair and practical manner in which new route applications can be heard is in a consolidated proceeding which includes all applications to provide service within an area. In *Investigation of Local, Feeder and Pick-Up Air Service,* 6 C. A. B. 1, 2 (1944) the Board said:

> "A consolidated proceeding affords full opportunity to consider the character of services proposed by the various applicants and the relationship of the type of each service to the air transportation needs of the individual cities or towns. If a need for long-haul or

through service is apparent, this need can be provided for by designating the city as a stop on one or more existing routes. At the same time the need for service of a local character can be weighed in conjunction with local service proposals."

The orders of the Board denying the motions of the State of Rhode Island and Eastern for consolidation of Eastern's application under Docket 3501 into the proceeding in Docket 2196 *et al.* are clearly without support in reason or fact and are arbitrary and capricious. Section 10 (e) of the Administrative Procedure Act, 5 U. S. C. §1009 (e), requires that these orders be set aside by this Court.

II.

The Denial of the Motions to Consolidate the Application of Eastern in the Proceeding, Docket 2196 et al., Was Contrary to the Board's Regulations and Established Policy and Contrary to the Administrative Procedure Act.

Section 3(a) of the Administrative Procedure Act, 5 U. S. C. §1003 (a), requires every agency to "separately state and currently publish in the Federal Register (1) descriptions of its central and field organization . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted or authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public . . ." That section further provides that, "No person shall in any manner be required to resort to organization or procedure not so published."

Section 302.7 (b)(2) of the Board's Organizational Regulations provides in part as follows:

> "In proceedings upon applications by air carriers for new routes, it is customary to assign all pending applications for a similar service in the same general area for conference at one time."

Although the above-quoted provision of the regulations refers specifically to the prehearing conference, it is evident that the reference is actually to the entire proceeding and the prehearing conference is designated only because it is the starting point of the proceeding. That such is the Board's policy is confirmed in the following quotation from the Board's own decision in *Investigation of Local, Feeder and Pick-Up Air Service,* 6 C. A. B. 1, 2 (1944):

> "Inasmuch as the Board has since adopted the general practice of hearing in a consolidated proceeding all applications proposing service in the same general area, it does not appear necessary to consider further the population limitation proposed by the examiners."

In refusing to hear Eastern's application in the Docket 2196 *et al.* proceeding, the Board has clearly failed to follow its own regulations and established policy, for Eastern's application involves service to and from the same points which other applications now consolidated in the proceeding involve. Eastern and Rhode Island have been "required to resort to organization or procedure not so published," and the orders of the Board denying the motions of the State of Rhode Island and Eastern should be set aside. *Bridges* v. *Nixon,* 326 U. S. 135, 153 (1945); *United States* v. *Perkins,* 79 F. 2d 533 (C. C. A. 2d 1935); *United States* v. *Dunton,* 288 Fed. 959 (S. D. N. Y. 1923); *Sibray* v. *United States,* 282 Fed. 795 (C. C. A. 3d 1922).

III.

The Denial of the Motions For Consolidation of Eastern's Application In the Proceeding, Docket 2196 et al., Denied Eastern an Effective Hearing and Prejudiced Rhode Island's Interest Therein.

The State of Rhode Island feels that Eastern is the only applicant in the proceeding under Docket 2196 which is prepared to give and will give Providence both the local and nation-wide service adequately adapted to fulfill its air transportation needs.

The State of Rhode Island therefore feels that adequate air service for Providence depends on a grant to Eastern of its application.

It is very evident that the failure of the Board to consolidate Eastern's application under Docket 3501 with the other applications under Docket 2196 will seriously prejudice, and, without any practical doubt, finally foreclose Eastern's right to compete for the proposed new route.

The fact that Eastern and other established airlines are seeking permits to operate on the new route shows that they believe that the public interest requires the route. The State of Rhode Island will show in the proceeding that the public convenience and necessity require the routes. The probability is great that the Board will so find. In any event, if such a route is to be authorized at any time in the foreseeable future, it almost certainly will be authorized in the proceeding under Docket 2196.

Within Docket 2196 are already the applications of several established airlines now holding certificates of public convenience and necessity from the Board. An applicant for a certificate already holding and operating under other certificates has *never* been denied a new certificate on the ground that it was not "fit, willing, and able" to operate the line.

If the Board should find that the "public convenience and necessity" would be served by the new route (and the

State of Rhode Island and almost all the applicants believe that it will so find), and that one of the applicants is "fit, willing, and able" to serve (and there is no practical possibility that all applicants will be found to be disqualified), the Board would be required under Section 401 (d) of the Civil Aeronautics Act, 49 U. S. C. §481 (d), to grant a certificate to one of the qualified applicants.

The authorization of another "local" carrier in the New England area would make practically impossible the granting of Eastern's requested authorization in a later proceeding. The Board imposed restrictions on Eastern's operations to and from New England in order to protect the two carriers then authorized to provide local service in the New York-Boston area. *Additional Service to Boston,* 4 C. A. B. 686, 695 (1944); *New England Case,* 7 C. A. B. 27, 36, 439, 441 (1946). Obviously, if one or more applications for certificates are granted in the proceeding under Docket 2196, the original reasons for the restrictions would be multiplied and Eastern would be unable to obtain the authorizations sought in its application.

The right of intervention is obviously inadequate to permit Eastern and the State of Rhode Island to show that Eastern's application under Docket 3501 should be authorized before those of the other applicants. Intervention offers neither party an opportunity to present economic data, evidence, and argument in favor of Eastern's proposed new service in the area, but restricts both the State of Rhode Island and Eastern to negative testimony against the granting of the applications now consolidated. Certainly this is true, since the Board can hardly contend that as an intervener Rhode Island and Eastern will have the opportunity of presenting all evidence and argument in favor of Eastern's application, when, as noted above, the Board denied the motions for consolidation on the grounds that inclusion of Eastern's proposals would unduly expand the proceeding.

Rhode Island's interest in the proceeding is so clearly prejudiced from the beginning that it can take no effective

position in the proceeding at all unless it is dishonest with the Board. The authorizations applied for by Eastern are required by the public convenience and necessity, but can Rhode Island say so and undertake to prove so when by so doing it may foreclose its opportunity to obtain the service proposed by Eastern? Can Rhode Island be dishonest with the Board—and obviously inconsistent to the point where the Board would have little respect for Rhode Island's evidence—by stating in Docket 2196 *et al.* that the route is not needed and by later stating in a hearing on Eastern's application that the route is needed? Can Rhode Island say to the Board that the route is needed but that Eastern is the carrier which should be authorized to operate the route, when the Board has excluded that issue from the proceeding in Docket 2196, *et al.*? The Board's denial of the motions to consolidate has placed the State of Rhode Island in the position where it must either be dishonest or take no effective action in a proceeding in which Rhode Island has the greatest interest. Clearly Rhode Island will not receive a fair hearing under such circumstances.

One of the issues in the proceeding is stated by the examiner as being, "If public convenience and necessity require any route or routes, which carrier can best perform the service required?" (App. 65) It is evident from the above-quoted statement of the issues, that not all applicants who are fit, willing and able will be authorized to operate the routes found to be required and that the selection of a carrier to perform any needed service is a principal issue in the proceeding. It is equally obvious that the Board cannot legally determine "which carrier can best perform the service" while it arbitrarily excludes one of the applicants from consideration. The Board clearly cannot try the issues in Docket 2196, *et al.* simply by the process of partly deciding one of the issues prior to the hearing. Such a hearing would truly be a mockery of due process of law.

The Civil Aeronautics Act requires that Eastern be given a hearing on its application for the proposed service

in New England. Rhode Island is guaranteed a public hearing and the right to participate in support of Eastern's application. Section 401 (c), Civil Aeronautics Act, 49 U. S. C. §481 (c).

This statute contemplates and procedural due process requires that the right of hearing accorded Rhode Island means an effective hearing—an opportunity to present its case at a time when its merits may receive serious consideration. As has already been seen, if the Board should find that new routes between New York and Boston are needed (Rhode Island certainly believes that they are), and that one or more of the applicants is "fit, willing, and able" to serve (a practical certainty) then in the proceeding under Docket 2196, *et al.*, certificates for all such required service will be granted.

Such a granting will with practical certainty foreclose and preclude a grant to Eastern under its Docket 3501. The Board put a restriction on its New York-Boston route to protect *two* local operators. The Board has refused on two previous occasions to remove the restriction. The Board's previous attitude in insisting upon the restriction on Eastern's proposed New England service is convincing that no more than one New York-Boston route will be authorized in the proceeding under Docket 2196 or any proceeding in the foreseeable future.

With these practical considerations in mind, no other conclusion can be reached but that the applications under Docket 2196 and the application of Eastern under Docket 3501 are mutually exclusive.

In *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327 (1945) the Court held that the action of the Commission in granting one of two mutually exclusive applications without a hearing in which the merits of the second application could be presented amounted to denial of a hearing on the second application. At page 332 it was said:

> "By the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different. For we are told how difficult it is for a newcomer to make the comparative showing necessary to displace an established licensee."

Despite the fact that the Commission had broad power to revoke the grant and substitute a second applicant in a later proceeding, the Court held that the second applicant should not be required to resort to a hearing on its application which from a practical standpoint reduced its hearing to a reconsideration of the prior grant to its competitor.

Eastern and Rhode Island's case is much stronger than the *Ashbacker* case. A grant to one carrier cannot be recalled and another carrier substituted. As demonstrated above, the Board will certainly grant one of the five applications in Docket 2196 and such a grant will effectively preclude granting Eastern's application in Docket 3501.

It may be suggested that Rhode Island and Eastern could obtain adequate relief by appealing from the final disposition by the Board of all applications under Docket 2196. The suggestion ignores the insurmountable difficulties which would be incurred by this procedure. On the grant of a certificate to the successful applicant under Docket 2196, Rhode Island might seek reconsideration which, in keeping with the Board's practice, might be denied several weeks or months after the successful applicant had commenced operations. On appeal, and, after several months obtaining a judicial decision remanding the case to the Board for further hearing and decision, Rhode Island would be confronted with the problem of an accomplished fact. The newly certificated carrier would have spent thousands of dollars to obtain equipment, make installations, hire and train personnel, etc. To induce the Board to withdraw a certificate granted to another applicant

where such applicant had proceeded to make substantial expenditures in reliance on that certificate would be a practical impossibility.

The Supreme Court stated further in the *Ashbacker* case (326 U. S. 334):

> "While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application."

Reasoning that the effect of the previous grant was to make Ashbacker's "hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application," the Court said at page 331: "That may satisfy the strict letter of the law but certainly not its spirit or intent."

If Rhode Island is correct in its contention that the denial of the motions for consolidation of Eastern's application in the pending proceeding will render a subsequent hearing nugatory, Eastern has thereby been denied procedural process. *Morgan* v. *United States,* 304 U. S. 1 (1938).

Accordingly, the State of Rhode Island, having a substantial interest in Eastern's application, is likewise denied procedural due process.

WHEREFORE, the State of Rhode Island prays that the orders of the Board denying its motion (Order Serial No. E-2308) and Eastern's motion (Order Serial No. E-2201) for consolidation of Eastern's application under Docket 3501 into the proceeding in Docket 2196, *et al.,* be set aside, and that it be ordered and decreed by the Court that said

application of Eastern be forthwith consolidated under Docket 2196, *et al.*, for hearing and decision.

Respectfully submitted,

PHILIP SCHLEIT,
1346 Connecticut Ave. N.W.,
Washington 6, D. C.,

ALBERT R. TAVANI,
1405 Industrial Trust Building,
Providence 3, Rhode Island,

Attorneys for Rhode Island Port and Industrial Development Commission representing the State of Rhode Island.

April 6, 1949.

Certificate of Service

I hereby certify that on the 6th day of April, 1949, I served the foregoing brief on each of the parties to this proceeding by mailing a copy thereof, postage prepaid, addressed to Edward Dumbauld, Esq. and William D. McFarlane, Esq., Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C., to Emory T. Nunneley, Jr., Esq., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorney for Respondent, and to Llewellyn C. Thomas, Esq., Hibbs Building, Washington, D. C., Attorney for Petitioner.

PHILIP SCHLEIT

April 6, 1949.

PETITION OF EASTERN AIR LINES, INC. FOR REHEARING

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 10,099

EASTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR JUDICIAL REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

United States Court of Appeals
For the
District of Columbia Circuit

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Joseph W. Stewart
CLERK

E. SMYTHE GAMBRELL,
W. GLEN HARLAN,
HAROLD L. RUSSELL,
825 Citizens & Southern
National Bank Building,
Atlanta 3, Georgia

LLEWELLYN C. THOMAS,
Hibbs Buildings,
Washington, D. C.
Attorneys for Eastern Air Lines, Inc.

GAMBRELL, HARLAN & BARWICK
825 Citizens & Southern National Bank Bldg.,
Atlanta 3, Georgia
Of Counsel.

December 12, 1949.

Foote & Davies, Inc., Atlanta, Ga.

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PETITION OF EASTERN AIR LINES, INC. FOR REHEARING

The Court's opinion, dated November 30, 1949, in this appeal appears to be predicated on a series of assumptions which are not supported by the record:

1. That "Eastern Airlines, Inc., is a trunk-line operator".

2. That "The Board decided to limit [the proceeding under Docket 2196] to 'local or feeder-line service' ".

3. That, apparently, the Board did so limit the proceeding, and that was the reason Eastern's application was excluded.

4. That "It is not clear that anything included in petitioner's application is 'local or feeder-line service' and therefore within the scope of the New England case."

5. That "Even if some routes included in petitioner's application, *e.g.*, Boston to Providence, may be so regarded, we have no reason to suppose the Board will grant any certificates for those routes in the New England case, or without considering Eastern's application."

6. That the Board made a "finding that consolidation of this application for trunk-line service into other territory, with applications for local or feeder-line service within New England, would unduly expand the issues and broaden the scope of the proceeding."

7. That "If petitioner had presented an application limited as the applications consolidated in the New England case were limited, the Board would of course have consolidated it for hearing with the others."

8. That "petitioner sought to require the Board to deal in one proceeding with two very different kinds of service."

In the Board proceeding here under review, the Board made no "findings" which are worthy of the name. Consequently, any conclusions which the Court might reach or has reached must be based on surmise from various allegations and counter-allegations of the parties, including representations by the Board's attorneys.

In excluding Eastern's application from the consolidated proceeding, the Board stated merely the conclusion (R. 94) that "Consolidation of Eastern's application, Docket No. 3501, would unduly expand the issues and broaden the scope of the above-entitled proceeding." No reasons for that conclusion have been given by the Board. Thus, the Court is left to guess—and it has sought to guess, erroneously, Eastern submits—why the Board thought Eastern's application was beyond the scope of the proceeding under Docket 2196.

The vice of permitting an administrative agency thus to evade its statutory duty to make findings, clearly appears

from the present situation. Although the Board—the expert administrative agency charged with determining such matters—has refused to state why Eastern's application was excluded, this Court, with only allegations and arguments of various parties before it and without the benefit of the Board's expertise, seeks to set forth in a concise opinion a theory as to why the Board acted to deny Eastern a hearing. That theory is not only unsupported by findings of the Board, but it is contrary to the facts of record.

The Court's opinion is particularly surprising in view of this Court's decision in *Saginaw Broadcasting Company v. Federal Communications Commission,* 68 App. D. C. 282, 96 F. (2d) 554 (1938), which has been followed many times since it was handed down (recently in *American Broadcasting Company v. Federal Communications Commission,* App. D. C. No. 9760, October 17, 1949, pp. 9-10), where the Court pointed out clearly the types of findings which an administrative agency must make before a Court can determine intelligently whether the agency has acted properly.

This petition for rehearing is presented in the belief that the Court has overlooked some of the important facts of record, and has not given sufficient consideration to the complete failure of the Board to make findings in support of its ultimate conclusion to exclude Eastern's application from Docket 2196. Eastern urges that the Court consider the following facts, and grant rehearing in this case.

I.

THERE IS NO BASIS IN THE RECORD FOR THE COURT'S ASSUMPTION THAT "EASTERN AIRLINES, INC. IS A TRUNK-LINE OPERATOR"

There is no finding by the Board in this record that Eastern is a "trunk-line operator". Moreover, there is

nothing in the record to show what a "trunk-line operator" is, as distinguished from any other kind of operator. Without any such record basis, it is submitted that the Court cannot properly find, or attach significance to a finding, that Eastern is a "trunk-line operator".

II.

THERE IS NO BASIS IN THE RECORD FOR THE COURT'S ASSUMPTION THAT "THE BOARD DECIDED TO LIMIT" THE DOCKET 2196 PROCEEDING TO "LOCAL OR FEEDER-LINE SERVICE"

The Board's orders here complained of do not state that Docket 2196 is limited to "local or feeder-line service." Moreover, there is nothing in the record to show what a "local or feeder-line service" is, as distinguished from any other kind of service. Without any such record basis, it is submitted that the Court cannot properly find, or attach significance to a finding, that the proceeding under Docket 2196 was limited to "local or feeder-line service."

In this respect, it is submitted that the present opinion of the Court conflicts directly with the Court's recent decision in *American Broadcasting Company v. Federal Communications Commission, supra,* where the Court made the following statements (pp. 9-10):

> "The finding of fact made by the Commission set forth above, that the program service of KECA and the program service of the other stations mentioned as rendering primary service in the area beyond the protected contour of KECA are of the same general character, is a finding of ultimate fact only. The Commission made no finding of basic or underlying facts, *i.e.*, of what the program service of each of the several stations actually is. Obviously we cannot decide whether the ultimate finding—that the program service rendered by KECA is of the same general character as the pro-

> gram service rendered by the other stations—is rationally drawn from a comparison of the program service of each of the stations with that of the others unless we are informed what the program service of each station is. It is true that there is set forth in American's petition for reconsideration a purported description of the program service of KECA, and it appears that there is no dispute as to the correctness of that description. But there is no authentication of this by a finding of the Commission. And there is no statement anywhere in the record, either in the form of a Commission's finding or otherwise, as to what the program service of the other stations actually is. Moreover, the Commission did not, as required by the statute, file with the court the originals or certified copies of all papers and evidence presented to it. Not until this has been done and the basic facts as to the nature of the program service of each of the stations are found will we be able to decide whether or not those facts have substantial support in the evidence."

It should be noted that the instant case is a much more glaring example of lack of adequate findings by the administrative agency than the *American Broadcasting* case, *supra,* inasmuch as here there is no finding by the Board even in terms of whether Eastern's proposed service is the same as or different from the services proposed by the other applicants in the proceeding under Docket 2196. It follows *a fortiorari* that the Court "cannot decide whether the ultimate finding [in this case, that Eastern's application would "unduly expand the issues and broaden the scope" of the proceeding] is rationally drawn from a comparison of the [proposed] service of each of the [applicants] with that of the others unless we are informed what the [proposed] service of each [applicant] is." Of course here, as in the *American Broadcasting* case, there are certain allegations of the parties—which are disputed here, contrary of the situation in the *American Broadcasting* case. However, "there is no authentication" of any of such allegations "by

a finding of the Commission'' in this case, just as there was no such authentication in that case.

Such indications as there are in the record plainly refute any assumption that Docket 2196 is a ''local or feeder-line'' proceeding. An application of Northeast Airlines, Inc. (R. 26), which the Court's opinion describes as ''also a trunk-line operator,'' is included in the proceeding (R. 69). Clearly, if Northeast is a ''trunk-line operator'' and its application for a ''trunk-line'' route is in the proceeding, it cannot be supposed that the proceeding is limited to ''local or feeder-line'' proposals.

Moreover, the lead application which the Board consolidated for hearing in this proceeding (Docket 2196) specifically states (R. 21) that the applicant ''does not wish to be known as a Feeder-Line''. Not one of the applications consolidated in the proceeding seeks a limitation to ''local or feeder-line'' service.

The Court's opinion states that ''It is not clear that anything included in petitioner's application is 'local or feeder-line service' ''. It is respectfully submitted that this Court is in no position to affirm in any manner the rulings of the Board in this case in the absence of findings by the Board making it perfectly ''clear'' whether services proposed in Eastern's application constitute ''local or feeder-line service'' and demonstrating what, if any, significance such findings may have.

III.

THERE IS NO BASIS IN THE RECORD FOR THE COURT'S ASSUMPTION THAT THE BOARD WILL NOT GRANT COMPETING APPLICATIONS WITHOUT CONSIDERING EASTERN'S APPLICATION

The Court's opinion states that ''Even if some routes included in petitioner's application, *e.g.*, Boston to Provi-

dence, may be so regarded [as "local or feeder-line" routes], we have no reason to suppose the Board will grant any certificates for those routes in the New England case, or without considering Eastern's application." Again, there is no finding of the Board to support the Court's assumption.

The Board has set up a proceeding to consider the needs of New England for additional local service. How can the Court assume that the proceeding will be a nullity, and that the Board does not intend to grant any of the several applications for a New York-Boston route via Providence and other intermediate points? The Board has not found that no such application will be granted, and it has not stated in this case—as it has specifically asserted in other cases—that the grant of any such application would not foreclose the excluded application.

The relief here sought by Eastern should not depend on a *certainty* that the Board will grant a competing application and thereby foreclose Eastern's unheard application. A doomed man should not be required to wait until he is actually hanged before seeking habeas corpus.

The Supreme Court has clearly held in *Ashbacker Radio Corporation v. Federal Communications Commission,* 326 U. S. 327 (1945), that the granting of one application without a hearing on a competing application effectively denies hearing to the latter. Under the rule of the *Ashbacker* case, Eastern is entitled to a concurrent hearing if there is a possibility that a competing application might be granted and, if granted, would result in denial of Eastern's application after a subsequent hearing. That must be true, as, once the competing application has been granted, the damage has been done and, just as in the *Ashbacker* case, Eastern would then be remitted to a "hearing" which would in effect be a "rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application" (326 U. S. 331). As the Court stated in the *Ashbacker* case,

"That may satisfy the strict letter of the law but certainly not its spirit or intent."

The Court's opinion is impossible to understand insofar as it appears to say that "we have no reason to suppose the Board will grant any certificates for those routes ["routes included in petitioner's application"] . . . without considering Eastern's application." The Board has very expressly excluded Eastern's application from the proceeding, while including within the proceeding other applications for the same routes. It is perfectly apparent that any action of the Board in granting such routes in the proceeding under Docket 2196 will be taken "without considering Eastern's application." It follows that, in order to give Eastern the hearing to which it is entitled under the Civil Aeronautics Act, the Administrative Procedure Act, and the Constitution, the Board's orders denying consolidation must be set aside.

IV.

THERE IS NO BASIS IN THE RECORD FOR THE COURT'S ASSUMPTION THAT "PETITIONER SOUGHT TO REQUIRE THE BOARD TO DEAL IN ONE PROCEEDING WITH TWO VERY DIFFERENT KINDS OF SERVICE"

The Court's opinion states that "Petitioner's application includes a large amount of service that is neither of the local or feeder-line type, nor confined to New England, and is for both reasons outside the scope of the New England case." As demonstrated above, there is no basis in the record for the Court's conclusion that Eastern's application is different from applications consolidated under Docket 2196 insofar as the type of service offered is concerned. Eastern's application is as much for "local or feeder-line service" as the applications actually consolidated, and the

Board made no finding, and could make no finding, that Eastern's application should be excluded on any such ground.

The Court's statement that Eastern's proposed services were not "confined to New England" apparently is predicated on the fact that, if Eastern's application had been granted in one of the two alternative forms proposed in the application, it would have resulted in improvement of Eastern's service between New England points and points south of New York/Newark. However, the Court overlooks the fact that, included within Eastern's application, was a very specific request (R. 40) that it be given "new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston." It cannot possibly be asserted that such an application is "outside the scope of the New England case" so far as geography is concerned.

The Court's opinion states that "If petitioner had presented an application limited as the applications consolidated in the New England case were limited, the Board would of course have consolidated it for hearing with the others." As demonstrated above, Eastern's application is at least as limited with respect to type of service offered as the applications actually consolidated in the proceeding.

With respect to geography, Eastern's application certainly is as much restricted as other applications included within the proceeding. As demonstrated by the map opposite page 14 of Eastern's brief of April 6, 1949 in this appeal, the application of Northeast Airlines involves service into Canada—with implications extending at least as far north as any implications of Eastern's application extend south.

If the Board felt that Eastern's application, insofar as it requested removal of the restrictions on Eastern's New England service, was beyond the geographical scope of the proceeding, why did the Board not take the same steps to restrict the scope of Eastern's application as it took with

respect to the application of Northeast Airlines under Docket 3182? As will be noted in the Board's original consolidation order (R. 66), the Board severed from Northeast's application a portion thereof proposing an extension of Northeast's New York-White River Junction route to Burlington, Vermont via Montpelier, Vermont, and excluded that portion of the application from the consolidated proceeding. The Board has in numerous instances severed portions of applications, and has included within consolidated proceedings only the portions which it has felt are geographically appropriate.

The Board's attention was very specifically called to the fact that Eastern's application was for a route entirely limited to the geographical area covered by the consolidated proceeding. In the motion for consolidation filed by the State of Rhode Island (R. 91-92), it was pointed out:

> "Eastern's application cannot be excluded on the ground that it involves long-haul service and therefore is different from the other applications in this case. Actually, Eastern's application is for a new route between New York/Newark and Boston, as Paragraph 10 of its application under Docket 3501 states that Eastern seeks the new authorizations 'either as amendments to its existing Routes 5 and 6, or as new and separate routes between New York/Newark, New Haven, Hartford, Providence and Boston, as to the Board may appear desirable in the public interest.' As a new route application, Eastern's proposal is no different than the application of New England Central Airways under Docket 2196, which proposes a Boston-New York-Newark route via New Bedford and Bridgeport (using the Westchester and Teterboro airports as the New York and Newark terminals). Moreover, it would be strange and most unreasonable if the Board were to exclude an application which proposes the same service proposed by others, merely because it also proposes additional service. If the Board were to adopt such a policy of exclusion, consolidations of new route applica-

> tions would become virtually impossible. The Board's past practice furnishes no precedent for such a policy, but rather requires the consolidations here requested."

In Eastern's motion for consolidation (R. 72), it was specifically pointed out that "In the alternative, Eastern requests new local service routes between New York/Newark and Boston via New Haven, Hartford/Springfield and Providence."

It follows that Eastern did present "an application limited as the applications consolidated in the New England case were limited", and specifically called the Board's attention to the limitations. If the Board had had any real concern with limitations on the geographical scope of the proceeding, it could have given Eastern a fair hearing in the proceeding under Docket 2196 by severing and consolidating that portion of the application which indisputably is within the scope of this proceeding, namely, the portion requesting "new local service routes between New York/Newark and Boston via New Haven, Hartford/Springfield and Providence."

Eastern did not seek "to require the Board to deal in one proceeding with two very different kinds of service." Eastern presented the Board with the fullest opportunity to separate Eastern's application and to consider only such portions as the Board might deem appropriate. The Board's failure to take advantage of that opportunity strongly suggests that the Board did not actually consider Eastern's application to be beyond the geographical scope of the proceeding, and consequently this Court's assumption that such was the basis of the Board's action is unsupported in the record.

CONCLUSION

Eastern respectfully submits that, on the record in this case as it now stands, this Court is in no position to make any findings which would support or sustain the Board's

orders denying consolidation with Docket 2196 of Eastern's application under Docket 3501. Any attempt by the Court to make such findings would be simply to excuse the Board from performing its statutory duty of making findings in support of its own orders. The Board has made no attempt, in any official statement issued by it, to justify its action. The record shows that such action was completely arbitrary and unjustifiable. But, in any event, this Court should set aside the Board's orders in the absence of any findings by the Board, or any support in the record for such orders.

Eastern submits that the minimum action which this Court should take to correct the arbitrary and unjustified action of the Board is to remand the case to the Board with instructions to make findings which will inform the Court and Eastern of the reasons for the Board's orders denying consolidation of Eastern's application.

WHEREFORE, Eastern respectfully prays that this Court grant rehearing with respect to its decision of November 30, 1949 in this case, and that upon such rehearing the Court set aside the orders of the Board herein complained of.

E. Smythe Gambrell,
W. Glen Harlan,
Harold L. Russell,
825 Citizens & Southern
National Bank Building,
Atlanta 3, Georgia

Llewellyn C. Thomas,
Hibbs Building,
Washington, D. C.
Attorneys for Eastern Air Lines, Inc.

Gambrell, Harlan & Barwick
825 Citizens & Southern National Bank Bldg.,
Atlanta 3, Georgia
Of Counsel.

December 12, 1949.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 1949, I have mailed copies of the foregoing petition for rehearing, postage prepaid, to Edward Dumbauld and William D. McFarlane, Special Assistants to the Attorney General, Department of Justice, Washington, D. C., Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington, D. C., and Philip Schleit, Attorney for State of Rhode Island, 1346 Connecticut Avenue, N. W., Washington, D. C.

LLEWELLYN C. THOMAS

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

W. GLEN HARLAN